86-823
No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MOBIL OIL CORPORATION,
Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether determinations as to the character of land made by the United States with the concurrence of the State under the Swamp and Overflowed Lands Act of September 28, 1850, 43 U.S.C. 982 *et seq.*, are, as a matter of federal law, conclusive against the State when those classifications rest on approved federal surveys, were confirmed by State selections, were solemnized by federal patents issued pursuant to the Act, were implemented by State deeds carrying forward the Congressional scheme and were recognized by the State as valid determinations for a century thereafter.

2. Whether a State judicial decision which retroactively and without compensation permits the State to annul and regain titles to land long recognized as having been conveyed to and vested in private ownership contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking.

PARTIES BELOW

The parties to the proceeding in the Supreme Court of Florida are listed in the caption. The petitioner, Mobil Oil Corporation, is a subsidiary of Mobil Corporation. Coastal Petroleum Company was a defendant in the Florida trial court but did not perfect an appeal from the final judgment in favor of Mobil Oil Corporation.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Mobil Oil Corporation petitions this Court to issue a writ of certiorari to review the decision of the Florida Supreme Court in this case.

OPINIONS BELOW

The decision of the Florida Supreme Court in this and a companion case (App. A, *infra*, pp. 1a) is reported sub nom. *Coastal Petroleum Co. v. American Cyanamid Co.*, at 492 So.2d 339. The decision of the Florida District Court of Appeal for the Second District in this case (App. D, *infra*, pp. 25a) is reported at 455 So.2d 412, and the decision of that court in the companion *American Cyanamid* case (App. E, *infra*, pp. 34a), which was adopted by reference in the present case, is reported at 454 So.2d 6. The decision of the Cir-

cuit Court for Polk County (App. F, *infra*, pp. 42a) is reported at 2 Fla.Supp.2d 12.

JURISDICTION

The decision of the Florida Supreme Court was rendered on May 15, 1986, with the express notation that it would not become final "until time expires to file rehearing motion and, if filed, determined" (App. A, *infra*, p. 10a). A timely motion for rehearing (App. G, *infra*, p. 52a) was denied on August 27, 1986 (App. B, *infra*, p. 22a). The judgment of the State Supreme Court (App. C, *infra*, p. 23a) was entered on the same day. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). *See* discussion, pp. 15-25, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides:

> Nor shall private property be taken for public use, without just compensation.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Swamp and Overflowed Lands Act of September 28, 1850, 43 U.S.C. 982 *et seq.*, in relevant part, provides:

> Section 1, 43 U.S.C. 982:
>
> To enable the several States (but not including the States of Kansas, Nebraska, and Nevada) to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein—the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A.D. 1850, are granted and belong to the several States respectively, in which

said lands are situated: Provided, however, That said grant of swamp and overflowed lands, as to the State of California, Minnesota, and Oregon, is subject to the limitations, restrictions and conditions hereinafter named and specified in this chapter, as applicable to said three last-named States respectively.

Section 2, 43 U.S.C. 983:

It shall be the duty of the Secretary of the Interior, to make accurate lists and plats of all such lands, and transmit the same to the governors of the several States in which such lands may lie, and at the request of the governor of any State in which said swamp and overflowed lands may be, to cause patents to be issued to said State therefor, conveying to said State the fee-simple of said land.

The proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming said lands, by means of levees and drains.

Section 3, 43 U.S.C. 984:

In making out lists and plats of the lands aforesaid all legal subdivisions, the greater part whereof is wet and unfit for cultivation, shall be included in said lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

STATEMENT

At issue here is the ownership of an upstream portion of the bed of the Peace River in central Florida as it existed in 1845.[1] The State (through the Board of Trus-

[1] Although other lands were embraced by the Complaint in this case, we have confined our focus to the areas claimed by the Trustees as the bed of the Peace River. We so limit our presentation because it does not appear that the State Trustees—as distinguished from their lessee, Coastal Petroleum Company, no longer a party to the only case before this Court—claim other parcels,

tees of the Internal Improvement Trust Fund) maintains that the river, in the relevant stretch, was navigable when Florida was admitted to the Union and that it accordingly owns the water bottoms to the ordinary high water mark. Petitioner, on the other hand, asserts that the portion of the river in suit was not (and is not) navigable and that the bed, together with adjoining lands, was properly conveyed as swamp and overflowed land to its predecessors a century ago. But it is not that disagreement that is tendered to this Court for resolution. Rather, the question presented is whether, in circumstances like those present here, such a factual issue ought to be open to litigation at all so long after the character of the land has been determined by final administrative action of the Secretary of the Interior in which the State participated and concurred pursuant to the Swamp Lands Act of 1850. We answer "No" and submit that in decreeing otherwise for the first time in this case, the Florida Supreme Court has both contravened federal statutory law and condoned a taking of private property without compensation in violation of the United States Constitution.

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primarily those beneath and along various tributaries of the North Prong of the Alafia River, as "sovereign" lands underlying a navigable stream. In any event, however, the same arguments would be applicable to the Alafia River lands, which were also surveyed, without meandering of the stream, and were then embraced within federal patents and later State deeds as swamp and overflowed lands.

It should also be noted that there is a substantial disagreement between the parties as to the width of the bed of the Peace River as it existed in 1845, and as to the extent and legal effect of subsequent changes. But that dispute will be mooted if, as we contend, the State is now foreclosed from challenging the contemporaneous deterimnation that the lands underlying the stretch of the river in suit were swamp and overflowed lands within the meaning of the Swamp Lands Act. For present purposes, the Court may assume that the State's definition of the bed is correct, and we accordingly so characterize the disputed lands hereinafter—without, of course, intending any binding concession should further proceedings be necessary.

1. Before detailing the particular facts of the case, it may be useful briefly to sketch the historical backdrop. Upon its admission to the Union in 1845, Florida—like all other newly admitted States—acquired title to the beds of inland navigable water bodies not previously alienated by the United States. These water bottoms—to ordinary high water mark—are what Florida denominates its "sovereignty lands." They inured to the State by operation of the constitutional principle of "equal footing" and no grant from Congress or confirmatory patent by the United States was required. *See Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-375 (1977). But, a few years later, Florida—in common with most "public land" States—also received very substantial lands from the United States by a wholly different route. This was the grant effected by the Swamp and Overflowed Lands Act of September 28, 1850 (*supra*, pp. 2-3), which, in the case of Florida, transferred some 22 million acres, almost two-thirds the entire land area of the State.

As its first Section makes clear, the 1850 Act reached areas which, in their natural state, were not suitable for cultivation because they were either swamps, requiring drainage, or were periodically overflowed by water, requiring the construction of levees. *See San Francisco Savings Union v. Irwin*, 28 Fed. 708, 710 (9th Cir. 1886), *affirmed*, 136 U.S. 578 (1890). In Florida, at least, this description encompassed the beds of all non-navigable water bodies, but no navigable streams. Congress, it should be noted, expressly declared that the purpose of the grant was to enable the land to be "reclaimed," not preserved as wetland. Section 1, 43 U.S.C. 982, *supra*, p. 2. *See Wright v. Roseberry*, 121 U.S. 488, 496 (1887). And, to this end, the States were encouraged to sell the lands to private entrepreneurs, who were no doubt expected to expend something of their own efforts in reclamation. But the State also would

contribute, it being explicitly provided that all proceeds of sale must be devoted to building levees and drains. Section 2, 43 U.S.C. 983, *supra*, p. 3.

Another aspect of the Swamp Lands Act is of special interest here. A present grant as of the date of the statute was intended, and a precise statutory procedure for the identification of the granted lands was provided in the statute. *Wright v. Roseberry, supra*, 121 U.S. at 509. Congress established a clear and full procedure for classifying and transferring particular tracts of swamp or overflowed land. First, surveys were to be conducted by federal officers, indicating the boundaries of tracts deemed to qualify under the Act. Section 2, 43 U.S.C. 983, *supra*, p. 3. The federal surveyors were instructed that the beds of navigable water bodies—which, now, after statehood, did not belong to the United States and therefore could not be granted by it under the 1850 Act—should be expressly excluded on the survey plats by tracing a "meander line" that approximated the ordinary high water mark. *See General Instructions to Deputy Supervisors of Florida (1850), p.1; Manual of Instructions to Regulate Operations of Deputy Surveyors (1855)*, pp. 6, 12, 13, 14, 18. After review and final approval of the surveys by higher federal authorities, the lists and plats of the lands determined by the Secretary of the Interior to be swamp or overflowed lands were then to be transmitted to the State Governor. Section 2 of the Act, 43 U.S.C. 983, *supra*, p. 3. *See French v. Fyan*, 93 U.S. 169, 171 (1876). The State was invited to select any or all lands classified as swamp or overflowed. *Ibid.* But the Governor was also free to dispute the classification, and not infrequently did so. *See*, Affidavit of Joseph R. Julin, pp. 20-21, Attachment C to Memorandum of Law in Support of Motion for Summary Judgment, R. 57.

Finally, after the State submitted its selection of land to the Secretary, the Act stipulated that an express

patent would be issued by the United States. Section 2, 43 U.S.C. 983, *supra*, p. 3. Once again, an opportunity for correcting error was thereby provided. And, obviously, the State authorities had still a further occasion to review the classification before actually selling the lands and issuing their own deeds to private purchasers.

2. Common experience tells us that all things contemplated by the law are not always done in fact. And when short-cuts have occurred, it is debatable whether courts should notice or turn a blind eye. But no such dilemma arises here because the letter of the law *was* followed.

Thus, the area in dispute—some 7,000 acres under and alongside the upper Peace River—was fully surveyed in the 1850's and classified as swamp and overflowed lands.[2] Nor was the Peace River or its navigable character overlooked. For some 40 miles upstream from its mouth on the Gulf of Mexico, the river was meandered, indicating the surveyor's opinion that this stretch was navigable and that the bed there could not therefore be classified as swamp or overflowed land. *See Burns v. Coastal Petroleum Co.*, 194 So.2d 71, 74 (Fla. 1st DCA 1966), *cert. denied*, 201 So.2d 549 (Fla.), *cert. denied*, 389 U.S. 913 (1967). But, further upstream, and long before the portion that concerns us, the surveyors obviously took a different view. They pictured the river on their plats and measured and plotted the width every time the survey took them across it (from 33 to 115 feet in our area), but they no longer meandered its banks. This, of course, reflects a conclusion that the upper reaches of the river were not navigable—as is confirmed by field notes which explicitly refer to the river in its widest part as "shallow water," obstructed by "rapids, running over rocks."

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[2] We put to one side, for the moment, the very few parcels that were transferred to the State by so-called "internal improvement" land patents in 1876, 1878 and 1894 pursuant to the Act of September 4, 1841, 5 Stat. 453, or which inured to the State as "school sections" pursuant to the Act of March 3, 1845, 5 Stat. 788. See also n.1, *supra*.

See, e.g., Field Notes of W.G. Mosley for Township 32 S., R.25E. (1855) at 293, 304, part of Attachment E to Memorandum of Law in Support of Motion for Summary Judgment, R. 57.

The plats on their face indicate that they were subjected to the customary screening procedure within the Department of the Interior before final approval was given. Thereafter, the plats again had to be inspected in making out the lists provided for by Section 3 of the Act (43 U.S.C. 984, *supra*, p. 3), which required a computation whether or not the legal subdivision was mostly swamp and overflowed land. Only after these steps had been completed were the lists and plats transmitted to the State Governor—not all at one time, but in several groups, as the plats and lists were completed.

The State was an active and independent participant in this selection and classification process. By statute enacted in 1851, the Governor of Florida was authorized by the State Legislature "to take such measures as to him may seem expedient and most to the interest of this State in securing and classifying the lands lately granted to this State, designated as 'swamp or overflowed lands. . .'" Ch. 332, § 1, Laws of Fla. (1851). The same statute provided funding for "examining the lands to be secured" and for procuring "maps, plats, records, field notes and other evidence touching the title and description of said lands." *Ibid.* The Florida Governor was thereby armed with the authority and means to make an independent determination as to which lands qualified as "swamp" or "overflowed" and, if necessary, to dispute the Secretary's classification. *See*, Affidavit of Joseph R. Julin, p. 21, *supra.* In due course, a succession of Florida Governors submitted requests for patents, and, after the usual delays—presumptively attributable to cautious rechecking—federal patents were prepared and issued to the State between 1856 and 1889. There were thus numerous occasions, over many years, to catch out any error in classifying the Peace River lands.

Finally, mostly in the early 1880's, the State itself sold the lands involved here at a fixed price per acre and issued unrestricted deeds of conveyance to petitioner's predecessors.[3] The deeds were executed by the Trustees of the Internal Improvement Fund who, since 1855, had title to the State's swamp and overflowed lands (but not so-called "sovereignty lands" underlying navigable water bodies). *See* Chapter 610, Fla. Stats. (1855). Although ample opportunity existed, it appears still no one questioned the true character of the acreage as swamp and overflowed lands. In fact, as late as 1965, the State Trustees expressly disclaimed ownership of the bed of the unmeandered portion of the Peace River involved here. *See Burns v. Coastal Petroleum Co., supra*, and the Trustees' Brief therein at pp. 13-14.

3. The present controversy was provoked by litigation initiated in 1976 in a different Florida Circuit Court (for Leon County) between petitioner and a mineral lessee from the State, Coastal Petroleum Company. Although the original breach of contract action has long since been settled, counterclaims in that proceeding, joined by the State Trustees, for the first time disclosed the State's new stance, claiming for itself as "sovereignty lands" areas beneath and along the Peace River deeded to petitioner's predecessors as swamp and overflowed lands. *See* the decision of the Florida District Court of Appeal in the Present case, App. D, *infra*, pp. 25a-27a. We need not recite the troubled procedural history of that lawsuit, which includes a removal to federal court and a ruling by the Eleventh Circuit vacating the district court decision and remanding the case to the State courts. *See Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir.), *cert. denied*, 459 U.S. 970 (1982). Suffice it to say that the Florida Supreme Court has now finally ruled—in this respect affirming the District Court

[3] The most recent deed from the State covering any of the lands in suit (other than intervening tax deeds) was in 1909.

of Appeal—that those proceedings were no bar to the present quiet title action. *See* App. A, *infra*, p. 9a. On the other hand, petitioner remains exposed in that other suit to damages for alleged conversion of minerals which have been estimated by Coastal Petroleum at $1.4 billion. *See* Petition for Certiorari in No. 82-379 at p. 11.[4]

The case now before this Court was begun by petitioner in the Polk County Court in 1982 against the State Trustees and Coastal Petroleum, the State's mineral lessee. Its object was to quiet title to lands beneath and alongside the Peace and Alafia Rivers that the State and its lessee were claiming, almost all of which had been patented to the State, and in turn deeded by the State, as swamp and overflowed lands. The trial court granted summary judgment in favor of petitioner (App. F, *infra*, pp. 42a). At the same time, that court entered a like judgment in a comparable action filed by the similarly situated American Cyanamid Company.

The State Trustees prosecuted an appeal in both cases while Coastal Petroleum did so only in the *American Cyanamid* case. The District Court of Appeal decided the two appeals the same day, but wrote separate opinions. In our case, the appellate court discussed only the claim that the Polk County Court should have dismissed or stayed all proceedings there because of the previously pending action in Leon County—an issue not presented to this Court—and overruled the plea. App. D, *infra*, pp. 27a-32a. As to the merits, the court simply adopted by reference its opinion in the *American Cyanamid* case—where full reasons were given for affirming the trial court. App. E, *infra*, pp. 37a-40a. Although it answered

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[4] This explains the statement of Florida's Chief Justice, dissenting, that "Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money * * * and the question of who gets it." App. A, *infra*, pp. 18a-19a.

all three in the affirmative, the Court of Appeal was persuaded to certify the following three questions to the Florida Supreme Court:

> (1) whether the concurrent classification of the area now in dispute as swamp and overflowed lands by both federal and State officers, evidenced by Nineteenth Century surveys, selections, patents and deeds, now precludes the State's claim that substantial portions of the lands conveyed were inalienable sovereignty lands; [5]
>
> (2) whether the well-established principle of estoppel by deed barred any claim of ownership by the Trustees; and
>
> (3) whether Florida's Marketable Record Title Act (MRTA) applied to deeds issued by the state or any of its instrumentalities.

A divided State Supreme Court reversed (except as to the procedural point) in an opinion covering both cases, answering each of the certified questions in the negative. App. A, *infra*, pp. 3a-9a. Four of the five apparently most relevant precedents of the court, *Pembroke*,[6] *Lobean*,[7] *Wetstone* [8] and *Claughton*,[9]—all cited in the decisions under review and in briefs—were simply ignored by the majority. But see Chief Justice Boyd's dissent, App. A, *infra*, pp. 10a-20a. The most recent case, *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1976), was distinguished away as dealing only with unmeandered *lakes* and *ponds*,

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[5] We have re-phrased the first of these questions in the interest of clarity. Compare App. E, *infra*, p. 40a.

[6] *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933).

[7] *Trustees of the Internal Improvement Fund v. Lobean*, 127 So.2d 98 (Fla. 1961).

[8] *Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10 (Fla. 1969).

[9] *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (Fla. 1956).

but not unmeandered streams, and broader language in *Odom* was dismissed as improvident dictum. App. A, *infra*, pp. 7a-8a. As already noted, the Chief Justice, joined by another Justice except as to one point, dissented. App., *infra*, pp. 10a-20a. A motion for rehearing was denied without opinion. App. B, *infra*, p. 22a.

REASONS FOR GRANTING THE WRIT

For many years, federal, State and local governments have, through sometimes highly restrictive land use regulation, preserved or restored public values in private land, and this Court has not been ungenerous in sustaining such measures against the charge that they effected a "taking" of property without compensation. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986); *Williamson Planning Commission v. Hamilton Bank*, No. 84-4 (June 28, 1985); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Penn Central Transport Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). Nor do we here challenge like regulation. On the contrary, even though private ownership of the river bed has been acknowledged by all until the last decade, petitioner has always respected local restrictions against phosphate mining within the 25-year flood plain of the Peace River, and otherwise complied with state and local environmental and reclamation regulations. So, also, we fully accept—indeed suggested—the reservation of public rights to use of the Peace River waters set forth in the trial court's judgment in this case. App. F, *infra*, p. 51a.

There are, however, some limits: regulation that "goes too far" in appropriating private property interests to

public uses will be struck down unless payment is made. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-416 (1922). And so, it has become the fashion for States to ask their courts to declare that the land sought to be recaptured, although apparently unrestrictively conveyed into private hands in the last century, never left the public domain or did so only impressed with a pervasive "public trust" easement. *E.g., Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198 (1984); *Hughes v. Washington*, 389 U.S. 290 (1967); *see* R. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L.Rev. 631, 643-664 (1986). *Cf. California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 277 (1982); *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded*, No. 85-406 (June 23, 1986); *Nolan v. California Coastal Commission*, —— Cal. App. 3d —— (1986), *juris. noted*, No. 86-133 (October 20, 1986). This is another such case—which ought fare no better than its predecessors.

Let us be clear what is at stake. The Florida Supreme Court has invited the State authorities to question all private titles to land now or once underlying any water body arguably navigable in 1845, no matter that there was a joint federal-State determination under the Swamp Lands Act of 1850 that no navigable water bottoms were involved, that the subsequent deeds from the State were executed more than a hundred years ago, and that the grantees have been in undisturbed possession (and paid taxes) since then. In Florida alone, this implicates several million acres. The principle affects land holders large and small, as well as towns and counties, both as owners and as taxing authorities, and presumably reaches lands re-acquired by the United States for military and

other purposes. But, equally worrying, if left unreversed, the Florida decision encourages other States to be no less zealous.[10] The disrupting effect of such a widespread clouding of land titles is difficult to exaggerate. Nor can one minimize the burden thrust on litigants and courts if old land classifications are indefinitely open to challenge and the historic status and dimensions of water bodies as of a State admission date must be reconstructed today, or tomorrow, accurately plotting all the intervening geographical changes, and determining whether each was natural or artificial, slow or sudden. *Cf. California ex. rel. State Lands Commission v. United States*, *supra*, 457 U.S. at 286 n. 14.

One might have supposed that this Court's recent unanimous ruling in *Summa Corporation* would arrest the new vogue for judicial revisionism in the service of the "public trust" doctrine. But it appears the lesson has been put aside as bearing only on Mexican titles confirmed by the Act of March 3, 1851. The time is ripe, we submit, for the Court to make clear that the 1851 Act does not stand entirely alone as a shield, and that, independently of any applicable federal statutes, the Constitution itself safeguards private property against the attempt to manipulate it out of existence without invoking the power of eminent domain and the attendant obligation to pay just compensation, whether the means employed involve judicial declaration, legislation, or administrative regulation.

To be sure, before intervening, the Court must be satisfied not only that a legal earthquake has occurred, but also that a substantial federal question is properly presented. We now undertake that demonstration.

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[10] Besides Florida, the Swamp Lands Act applied to all but three of the "public land" States, effecting particularly extensive grants in Arkansas, Michigan, Minnesota, Louisiana, Mississippi, Alabama and California.

1. It is plain enough that a federal "title, right, privilege or immunity" within the purview of 28 U.S.C. 1257(3) is involved in each of the claims now asserted—that the Swamp Lands Act accords conclusive force to the recital in patents issued thereunder after full survey and State selection classifying the described acreage as swamp and overflowed lands, as against the seller State's century-later effort to undo that classification; and that the State of Florida, through the decision of its Supreme Court, has violated the Due Process Clause of the Fourteenth Amendment by condoning the "taking" of petitioner's property without payment of just compensation.[11] Nor can it seriously be suggested that either argument is insubstantial (see pages 19-25, *infra*). To establish this Court's jurisdiction, it remains only to show that at least one of these claims was properly presented to the State courts and that the judgment sought to be reviewed is final.

a. Normally, the federal issue must be raised in the State courts before final decision or be explicitly decided by the judgment under review. But, reasonably enough,

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[11] It need hardly be said that the test for determining the existence of a federal question for purposes of *this* Court's jurisdiction under Section 1257(3) of the Judicial Code is not the same as is applied to determine the jurisdiction of a federal district court under Sections 1331(a) or 1441(b). In the former instance, it is enough that the federal right or immunity have been relied upon by the petitioner to overcome a defense to the original claim, whereas, in the latter case, the federal right must be an essential ingredient of the well-pleaded complaint. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-495 (1983); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675-678 (1974). Here, petitioner's title claim properly rested on deeds from the State and the federal arguments are relied upon to defeat the State's defensive plea that the recital of the deeds, and of the underlying federal surveys and patents, may be impeached and disregarded if a jury finds today that, in fact, the lands underlay navigable waters in 1845. Thus, there is no inconsistency between the remand order entered in *Mobil Oil Corp. v. Coastal Petroleum Co., supra*, and the present application to this Court.

that requirement is relaxed when the right, title or immunity under federal law emerges only because "the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Prune-Yard Shopping Center v. Robins*, *supra*, 447 U.S. at 85-86 n. 9. *See also Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-678 (1930). As we demonstrate in a moment, that is the situation here. Accordingly, with respect to the federal constitutional claim, it is sufficient that it was unambiguously presented to the State Supreme Court by motion for rehearing (App. G, *infra*, pp. 63a-64a), the denial of which must be deemed a rejection of the argument, even though no opinion was issued. *E.g.*, *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-367 (1932); *Brinkerhoff-Faris Trust Co. v. Hill*, *supra*; *Ohio ex rel. Bryant v. Akron Park District*, 281 U.S. 74, 79 (1930). But it is, of course, so much the better that the federal constitutional point was also raised, albeit in a minor key, in a predecisional brief in the Florida Supreme Court.

It is perhaps less clear that the federal *statutory* argument noted as the first Question Presented was fleshed out in the courts below as well as it might have been. Here we must rely on the citation—both in a trial court memorandum supporting the motion for summary judgment and in a brief to the Florida Supreme Court—of decisions of this Court and the correct description of them as barring later impeachment of the action of the Secretary of the Interior in approving surveys and issuing patents under the Swamp Lands Act which defined the acreage involved as swamp and overflowed lands. We believe this satisfies the requirement. But even if we failed to state our reliance on the 1850 Act of Congress with sufficient clarity, this Court remains free to consider the statutory point. The rule is well settled that, once jurisdiction attaches because of a properly presented federal question, the Court may notice any other federal

ground of decision disclosed by the record—even when the petitioner does not advance it. *E.g., Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., supra*, 429 U.S. at 363 n. 3, and 384-385 (Marshall, J., dissenting); *Wood v. Georgia*, 450 U.S. 261, 264-265 n. 5 (1981). This would seem a particularly appropriate occasion to exercise that discretion since disposition of the case under the Swamp Lands Act avoids a complex constitutional question of unusual gravity. Cf. *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).

b. We turn to the requirement of finality in Section 1257. There can be no serious doubt that the case is final with respect to the question presented under the Swamp Lands Act. After all, the whole point of that submission is that, in circumstances like those here, the federal statute *precludes* the factual trial (on "navigability" as of a century ago) ordered by the Florida Supreme Court on the ground that the Secretary's determination based on official surveys, together with the concurrence of the State Governor and the resulting issuance of federal patents, cannot be impeached. Thus, any charge that the decision below is not final must be restricted to the *constitutional* argument.

It is true that the judgment below contemplates further proceedings on the navigability of the Peace River at statehood and, if an affirmative answer is given, the location of the ordinary higher water mark, and that, should petitioner prevail on those matters, the "taking" question may be mooted. But we are surely justified in asserting that petitioner's security of title, immune from re-assessment at the behest of the State, is itself constitutionally protected property that has already been taken without compensation. At the least, the undeniable consequence of the Florida Supreme Court's decision is that today petitioner has no clear and marketable title of a value equal to that it enjoyed before that ruling.

At all events, the remaining issues are not ones that would commend themselves to this Court for review. Cf. *Block v. North Dakota*, 461 U.S. 273, 292 & n.29 (1983). If we put the Swamp Lands Act argument to one side, the Court would only intervene to settle the very general and important constitutional question whether States may circumvent the obligation to pay just compensation when taking private property by obtaining a belated judicial declaration that the property had never really left the public domain. The decision below on this point has already clouded land titles throughout Florida and, potentially, in many other States, and would continue to do so even if petitioner were ultimately to prevail on remand in this case. Indeed, unless the Court intercedes, this insecurity may persist indefinitely for many landowners, given the uniquely burdensome and protracted character of the litigation that will be needed to resolve the issues now re-opened.

In these circumstances, we submit the present case fully qualifies as a final decision within the fourth category noted in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975), as one in which "reversal of the state court on the federal issue would be preclusive of any further litigation" and "a refusal immediately to review the state court decision might seriously erode federal policy." Under a Constitutional regime that protects private property from confiscation, it must be a matter of national concern when a State court suddenly, but unambiguously, announces that all land titles embracing what may once have been the bed of a stream, no matter how venerable, are now suspended until it is redetermined whether or not the stream was navigable a century and a half ago.[12]

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[12] This is not a case like *Ariyoshi v. Robinson*, *supra*, in which it appears the Hawaii Supreme Court had, in answering questions certified by the Ninth Circuit, so attenuated its recent ruling that this Court was left in doubt whether the "taking" issue was ripe for determination. See Brief for the United States as Amicus

2. Of course, we must still show, at least in outline, that petitioner did hold an unimpeachable title to the land in dispute—as a matter of federal law or state law, according as our submission rests on the Swamp Lands Act or on the Due Process Clause of the Fourteenth Amendment. We first summarize the statutory argument.

In essence, our suggestion is that the Congress that enacted the Swamp Lands Act of 1850—no less than when it wrote the Act of March 3, 1851, recently considered in *Summa Corporation*—intended the determinations ultimately made in the proceedings mandated by the statute to be conclusive against later challenge by the State.[13] Decisions of this Court long ago established the general principle that the classification of land as swamp and overflowed through a determination of the Secretary of the Interior and the issuance of federal patents under the Act is unimpeachable because the Act "devolved upon the Secretary * * * the duty, and conferred on him the power of determining what lands were

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Curiae in No. 85-405 at 6-8, 9-19. Here, the Florida Supreme Court has been perfectly clear in declaring that no rule of finality or principle of estoppel by deed or statutory bar protects any land title against a State claim that its deed was improvidently granted to encompass the bed of a navigable waterbody, which claim may be pursued at any time at an evidentiary trial.

[13] This petition does not call into question the State's power legislatively to reclassify lands received from the federal government *before* the land is conveyed into private ownership. *See Mobil Oil Corp. v. Coastal Petroleum Co., supra,* 671 F.2d at 424. Nor do we deny that private lands whose pedigree traces back to the Swamp Lands Act are subject to State legislation "so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Corvallis, supra,* 429 U.S. at 377. What is questioned here is the power of a State court to permit an *ad hoc* judicial reclassification of land after the State has deeded it into private ownership, in direct repudiation of contrary determinations made concurrently by federal and State officials acting under authority of a federal statute.

of the description granted * * * and made his office the tribunal whose decision on that subject was to be controlling." *French v. Fyan, supra*, 93 U.S. at 171. *See also McCormick v. Hayes*, 159 U.S. 332, 348 (1895) (private grantee of Railroad Land Grant Act lands held to enjoy "rights secured by the laws * * * of the United States" against competing claim that lands were of a different character). Here, as we have detailed (pp. 6-8, *supra*), there were unambiguous surveys and concurrent action by the Secretary of the Interior and the Governor of Florida leading to the issuance of federal patents. The only question, then, is whether the same rule of finality obtains when the challenging party is the State itself, claiming the lands as "sovereign" navigable water bottoms which it previously owned and which the United States was therefore incompetent to convey after statehood, under the Swamp Lands Act or any other statute. Cf. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16 (1935).

The Court's decision three terms ago in *Summa Corporation* points to the answer. It was there argued that a patent issued under the 1851 Act, although otherwise conclusive, could not preclude the State's belated assertion of a "sovereign" interest in the land. *See* 466 U.S. at 206 & n.4. But the Court rejected the plea for such an exception, noting that the State could have presented its claim before the patent was issued. 466 U.S. at 204 n.3, 207-209. So, here. Indeed, ours is a stronger case, since, under the scheme of the Swamp Lands Act, the State is not merely a potential intervenor, but necessarily an active participant in and beneficiary of the proceedings. This is not a situation as in *Borax*, where the United States, acting unilaterally, effectively may be disposing of the State's lands or appurtenant rights behind its back. *See also Arizona v. California*, 460 U.S. 605, 634-638 (1983). Given the State's concurrent role, it is reasonable to read the Swamp Lands Act as foreclosing belated State claims, at least when, as in the

present case, the full statutory procedures have been followed and the State then and since expressly joined in classifying the land as properly subject to disposition under the statute. As it happens, this construction is buttressed by a provision of the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, which expressly excepts from the grant of "lands beneath navigable waters" the beds of unmeandered streams that had previously been alienated. 43 U.S.C. 1301(f).[14]

3. Even if the Swamp Lands Act did not itself shield petitioner's title from any belated challenge that impugns the federal surveys and patents, we are clear that State law independently mandated the same result, Florida for a century having treated its own later deeds as indefeasibly vesting a valuable right of property of the kind that the federal Constitution protects against uncompensated expropriation.

We need not, at this stage, explore all the minor twists and turns of Florida's submerged land cases over the century. *See, e.g.*, M. Rosen, *Public and Private Ownership Rights In Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. Fla. L. Rev. 561, 580-613 (1982). For present purposes, it is sufficient to note that, until this most recent decision, Florida —like most jurisdictions—accorded conclusive force to the recital in government deeds as to the classification of land and, at least after the passage of substantial time, barred any attempt at impeachment by the grantor except only in truly extraordinary circumstances. As summarized in one of the leading cases, the rule was that "the title and ownership of . . . land . . . should rest upon a grant, and not upon an evidentiary fact."

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[14] It is arguable that this statutory declaration is dispositive as "the rule of decision" provided by Congress for resolution of the federal question what are navigable water bottoms for the purpose of the Equal Footing Doctrine. Cf. *California, ex rel. Lands Comm'n v. United States, supra*, 457 U.S. at 279-281, 283-284.

Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249, 257 (1933). This basic proposition was bolstered, if need be, by the familiar doctrine of legal estoppel and by statutes of repose like the Florida Marketable Record Title Act (712.01 *et seq.*, Fla. Stat.). And, contrary to what is now suggested, there is no doubt that those principles were deemed fully applicable by the Florida Supreme Court against a claim that the conveyance erroneously included inalienable "sovereignty lands." *See, e.g., Pembroke v. Peninsular Terminal Co., supra; Board of Trustees of Internal Improvement Fund v. Lobean*, 127 So.2d 98 (1961); *Odom v. Deltona Corp.*, 341 So.2d 977 (1976). *See also Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10 (1969); *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (1956).

There were, to be sure, exceptions—as with all rules. And, as sometimes happens even with judges, these exceptions have been written overbroadly. But, if we attend to the facts, it is not difficult to explain the only four cases cited in these proceedings (which safely may be taken to have overlooked no relevant Florida decision) as permitting a Swamp Lands Act deed to be impeached.

In three of the cases, the lands had not been surveyed before conveyance and it was therefore unfair to assume that navigable waters within the description were intended to be encompassed. *See, State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908) (the Amelia River, part of the Florida Intracoastal Waterway); *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927) (Lake Okeechobee); *Pierce v. Warren*, 47 So.2d 857 (Fla. 1950), *cert. denied*, 341 U.S. 914 (1951) (Biscayne Bay). In the other case, decided in 1909, not long after the deed, the court was dealing with an obviously navigable body of water which *had* been meandered and which the grantee therefore could not suppose to have been included in a swamp and overflowed land conveyance. *See*

Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909) (Lake Jackson). In fact, the court was dealing with large and plainly navigable waterbodies in each of the other decisions as well. These, then, are no more than illustrations of the quite usual caveat that apparent fraud or gross error, or genuine ambiguity as to the boundaries of the conveyance, will permit going behind a deed, which in all other circumstances is unimpeachable. Cf. *Jeems Bayou Fishing and Hunting Club v. United States*, 260 U.S. 561 (1923); *Stewart v. United States*, 316 U.S. 354 (1942). No one has suggested that the present case is within that narrow exception.

4. In the decision sought to be reviewed, the Florida Supreme Court contradicts what has just been said about the prior State law. Until and unless that court, or the Florida legislature, restores the *status quo ante*, that judgment is binding as a declaration of State law for the future. But, notwithstanding the confident, even casual, tone of the opinion and the pretence that no precedents are overruled, it is for *this* Court to determine whether the Florida tribunal has made new law in such a way as to work a taking of vested property rights. *Demorest v. City Bank Co.*, 321 U.S. 36, 42-43 (1944); *Hughes v. Washington*, *supra*, 389 U.S. at 296-297 (1968) (Stewart, J., concurring). If we have correctly summarized the law of Florida before 1986, it necessarily follows that the present decision permits the confiscation of valuable land without payment. The only possible question remaining is whether this result passes federal constitutional muster because accomplished by *judicial* fiat, rather than legislative or executive action. The answer, it seems to us, is not in doubt.

We appreciate that a federal court, even this Court, must be especially hesitant to declare that a State judicial decree, defining State law, violates the Constitution. Cf. *Demorest v. City Bank Co.*, *supra*, 321 U.S. at 42-43. Yet, the Court has long ago settled that State judicial

action is subject to constitutional scrutiny. *E.g., Ex Parte Virginia*, 100 U.S. 339 (1880); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). *See Pulliam v. Allen*, 466 U.S. 522, 536-545 (1984). In a variety of contexts, moreover, the decision of a State court has been reviewed here to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right. *E.g., Ward v. Love County*, 253 U.S. 17 (1920); *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 438 (1923); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Demorest v. City Bank Co., supra; NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958); *NAACP v. Alabama*, 377 U.S. 288, 293-302 (1964); *Bouie v. City of Columbia*, 378 U.S. 347-355, 362 (1964). Indeed, in *Muhlker v. Harlem R.R. Co.*, 197 U.S. 544, 570 (1905), the Court struck down a State court judgment expressly on the ground that it effected an uncompensated taking of property. And, as already noted, the principle was espoused in Justice Stewart's concurring opinion in *Hughes v. Washington, supra.*

Accepting that such a disposition is justified only in extreme cases, we submit this is an appropriate occasion—assuming the Court concludes that it cannot rest decision on the Swamp Lands Act. Surely, there must be few more egregious examples of confiscation by judicial reinterpretation of the law, and none on such a grand scale. As the Florida Supreme Court itself said only a decade ago, in an almost identical case (now "narrowed" away to rob it of all precedential force), if the State wishes to recapture water bottoms improvidently alienated in the last century, let it be done openly, by the constitutional process of eminent domain, accompanied by payment of just compensation. *See Odom v. Deltona Corp., supra*, 341 So.2d at 987-989. The State legislature has not attempted any short cut, obviously

recognizing the constitutional obstacle.[15] Resort to the State courts to reach the same end cannot be allowed to succeed.

CONCLUSION

For the reasons stated, certiorari should be granted to review the decision of the Florida Supreme Court.

Respectfully submitted.

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NOVEMBER 1986

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[15] Thus, in 1978, when the Marketable Record Title Act was amended to exempt so-called "sovereignty lands", (§ 712.03(7) Fla. Stats.), the legislature declined to make the amendment expressly retroactive.

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

Nos. 65696, 65755 and 65913

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

AMERICAN CYANIMID COMPANY, *et al.*,
Respondents.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,

v.

AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

May 15, 1986

Rehearing Denied August 27, 1986

SHAW, Justice.

These consolidated cases are before us on petitions to review decisions of the Second District Court of Appeal reported as *Coastal Petroleum Co. v. American Cyanamid Co.*, 454 So.2d 6 (Fla. 2d DCA 1984), and *Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp.*, 455 So.2d 412 (Fla. 2d DCA 1984), in which the following questions were certified as being of great public importance:

> I. Do the 1883 swamp and overflowed lands deeds issued by the trustees include sovereignty lands below the ordinary high-water mark of navigable rivers?
>
> II. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands?
>
> III. Does the marketable record title act, chapter 712, Florida Statutes, operate to divest the trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?

American Cyanamid Co., 454 So.2d 6, 9-10. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution, and answer all three questions in the negative.

In 1982 and 1983, respondents filed separate quiet title actions in Polk County Circuit Court against petitioners claiming fee simple title to portions of the beds of the Peace and Alafia rivers. In each case, petitioners moved to dismiss the suits to quiet title based on *Mobil v. Garden Street Management Corp.*, 397 So.2d 920 (Fla. 1981). The trial court denied the motions. Respondents then moved for summary judgments in their respective cases. The trial court granted said motions.

The Second District Court of Appeal affirmed the summary judgments in separate opinions filed on July 13, 1984. 454 So.2d 6; 455 So.2d 412. In *American Cyanamid*, the district court held that under section 197.228 (2), Florida Statutes (1981), this state's unconditional conveyance of land to private individuals without reservation of public rights contemplated a finding that the land is not sovereignty land; that the Trustees were barred from asserting a sovereignty title claim by the doctrine of legal estoppel; and, that Florida's Marketable Record Title Act barred any otherwise valid sovereignty title claim. 454 So.2d at 8, 9. Recognizing, however, the significant impact of its decision on the riverbeds at issue, the district court certified to this Court the aforementioned three questions as being of great public importance. *Id.*

In *Mobil Oil*, the district court held that the Polk County Circuit Court did not err in denying petitioner Trustees' motion in the alternative because the Leon County Circuit Court lacked jurisdiction over the subject matter of respondent Mobil's reply counterclaim for the reason that the counterclaim is *in rem* in nature and local to Polk County Circuit Court. 455 So.2d at 416. The district court further noted that the substantive issues raised by petitioner Trustees were decided adversely to the Trustees in *American Cyanamid*. *Id.* By order of September 4, 1984, the district court certified to this Court the same three questions certified in *American Cyanamid*.

The first certified question is premised on the uncontroverted legal proposition that Florida received title to all lands beneath navigable waters, up to the ordinary high water mark, as an incident of sovereignty, when it became a state in 1845. No patents or surveys were required to delineate the boundaries of such sovereignty lands and title vested in the state to be held as a public trust. Thereafter, the federal government did not hold

title to such sovereignty lands and had no power to convey them to either the state or other parties. Moreover, any surveys run by the federal government establishing meander lines were not conclusive against the state as the boundary lines between state sovereignty lands and federal uplands. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935); *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).[1]

In contrast to state sovereignty lands, the title to nonnavigable swamp and overflowed lands, and other federal uplands, continued to reside in the federal government after 1845. However, in the 1850s, Congress exercised its power by conveying swamp and overflow uplands to the state. Surveys were conducted and patents issued whereby Florida received approximately twenty million acres of such lands. It is important to recognize that Congress had no intent or power to convey state sovereignty lands through such acts or patents and that land surveys conducted in connection with these conveyances of swamp and overflowed lands are not conclusive against the state as to the meandered boundaries of state sovereignty lands. *See Borax Consolidated, Ltd.*, 296

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[1] A meander line creates a rebuttable presumption of navigability but is not necessarily a boundary line unless it is expressly made one of the calls of the boundary. However,

> where a meander line is run under State authority for the purpose of identifying, locating and establishing the true line of ordinary high water mark of a body of navigable water, and the lands below high water mark are sovereignty lands, and the lands above high water mark are swamp and overflowed lands or other uplands subject to ordinary private ownership, in such case the meander line, if so intended and if duly and fairly ascertained and established, becomes, and, unless duly impeached, continues to be, a boundary line limiting the extent of conveyances of the adjacent uplands or of permissible grants or conveyances of the sovereignty lands below ordinary high water mark.

Martin v. Busch, 93 Fla. at 565, 112 So. at 284.

U.S. at 16, 56 S.Ct. at 26, citing to and relying on *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed 820 (1913); *Mobile Transportation Co. v. City of Mobile*, 187 U.S. 479, 23 S.Ct. 170, 47 L.Ed. 266 (1903); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *Goodtitle ex dem. Pollard v. Kibbe*, 50 U.S. (9 How.) 471, 13 L.Ed. 220 (1850); and *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845). The title to swamp and overflowed lands which Florida received in the 1850s and thereafter was vested in the Board of Trustees for the Internal Improvement Fund of Florida by the legislature. The title to sovereignty lands at this point remained in the legislature as a public trust. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); *Broward v. Mabry*, 58 Fla. 298, 50 So. 826 (1909); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893). These lands differ from other state lands. Sovereignty lands are for public use, "not for the purpose of sale or conversion into other values, or reduction into several or individual ownership." *State v. Gerbing*, 56 Fla. 603, 608, 47 So. 353, 355 (1908). Even after title to sovereignty lands was subsequently assigned to the Trustees, their authority to dispose of the land was rigidly circumscribed by court decisions and was separate and distinct from their authority to dispose of swamp and overflowed lands.[2] We answered the first certified question in the negative when we held in *Martin*, 93 Fla. at 573, 112 So. at 286-87 that:

> The State Trustee defendants cannot, by allegation, averment or admission in pleadings or otherwise affect the legal status of or the State's title to sovereignty, swamp and overflowed or other lands held

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[2] See discussion and cases cited in Comment, *Unfinished Business —Protecting Public Rights to State Lands From Being Lost Under Florida's Marketable Record Title Act*, 13 Fla.St.U.L.Rev. 599, 606-08 (1985).

> by the Trustees under different statutes for distinct and definite State purposes . . . . The subsequent vesting of title to sovereignty lands in the Trustees for State purposes under the Acts of 1919 or other statutes does not make the title to sovereignty land inure to claimants under a previous conveyance of swamp and overflowed lands by the State Trustees who then had no authority to convey such sovereignty lands and did not attempt or intend to convey sovereignty lands.

Further,

> [i]f by mistake or otherwise sales or conveyances are made by the Trustees of the Internal Improvement Fund of sovereignty lands, such as lands under navigable waters in the State or tide lands, or if such Trustees make sales and conveyances of State School lands, as and for swamp and overflowed lands, under the authority given such Trustees to convey swamp and overflowed lands, such sales and conveyances are ineffectual for lack of authority from the state.

Id. at 569, 112 So. at 285 (citations omitted).

The court below relied in part on the provisions of section 197.228(2), Florida Statutes (1981), which provides:

> (2) Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.

We do not agree that this section is pertinent to the issues at hand. We are dealing with navigable rivers not "so-called lakes, ponds, swamps, or overflowed lands." We are not persuaded that the legislature intended by

this statute to divest the state of title to navigable waters which were not, or could not be, conveyed to private owners. To accept this position would mean, inter alia, that if a navigable river gradually and imperceptively changed its course onto previously conveyed lands, the navigable river would become private property and the public would retain the dry river bed. The high and low water marks of navigable waters change over time, but these natural changes do not divest the public of ownership of the navigable waters. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973); *Municipal Liquidators, Inc. v. Tench*, 153 So.2d 728 (Fla. 2d DCA), *cert. denied*, 157 So2d 817 (Fla.1963).

The second certified question pertains to the effect of the Trustees' later acquisition of legal title to sovereignty lands encompassed within previously conveyed swamp and overflowed lands. This question was also addressed and answered in *Martin*, as the quotations above show. Not only is there no legal estoppel to the Trustees' claim of ownership in sovereignty lands, but the Trustees are prohibited by case law from surrendering state title to sovereignty lands based on a prior conveyance of swamp and overflowed lands. Sovereignty lands cannot be conveyed without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters. *Martin*, *Mabry*. The fact that a deed of swamp and overflowed lands does not explictly exempt sovereignty lands from the conveyance does not show that the Trustees intended to convey sovereignty lands encompassed within the swamp and overflowed lands being conveyed. Further, because grantees of swamp and overflowed lands took with notice that such grants did not convey sovereignty lands, neither they nor their successors have any moral or legal claim to these lands. *Martin*, 93 Fla. at 569-73, 112 So. at 285-87.

The final certified question is whether the Marketable Record Title Act (MRTA), chapter 712, Florida Statutes,

operates to divest the state of title to sovereignty lands. Respondents and the courts below rely on *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla.1976), for the proposition that the state's title to navigable water beds previously conveyed as swamp and overflowed lands is extinguished by MRTA. This reliance is misplaced. In *Odom* we rejected the state's argument that the notice of navigability concept applied to the grantees of swamp and overflowed lands under certain trustees' deeds because "it seems absurd to apply this test to small, non-meandered lakes and ponds of less than 140 acres and, in many cases, less than 50 acres in surface." *Id.* at 988. The ground on which *Odom* rests is this factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands. Unfortunately, even though this factual determination controlled and resolved the case, we went on to answer irrelevant arguments put to us by the parties and in answering one such argument concluded that MRTA was applicable to sovereignty lands encompassed within conveyances of swamp and overflowed land and that the claims of trustees "to beds underlying navigable waters previously conveyed are extinguished by the Act." *Id.* at 989. The statements concerning the effect of MRTA on navigable waterbeds were dicta and are non-binding in the instant case inasmuch as there were no navigable waterbeds at issue in *Odom*. *See Askew v. Sonson*, 409 So.2d 7 (Fla. 1981), where we requested and received briefs on the effect of MRTA on sovereignty lands. On reflection, and citing *Odom*, we declined to rule "on the question of whether a private owner's title to what had been sovereignty lands could be perfected by MRTA prior to the effective date of the 1978 amendment." *Id.* at 9. *See also City of Miami v. St. Joe Paper Co.*, 364 So.2d 439, 445, 449 (Fla.1978), *appeal dismissed*, 441 U.S. 939, 99 S.Ct. 2153, 60 L.Ed.2d 1040 (1979).

The issue of whether MRTA is applicable to sovereignty lands is squarely presented here. The issue has

two prongs. The first is whether the legislature intended to overturn the well-established law that prior conveyances to private interests did not convey sovereignty lands encompassed within swamp and overflowed lands being conveyed. We must assume that the legislature knew this well-established law when it enacted MRTA. We are persuaded that had the legislature intended to revoke the public trust doctrine by making MRTA applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized the epochal nature of such revocation. We see nothing in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets. The legislative purpose of simplifying and facilitating land title transactions does not require that the title to navigable waters be vested in private interests. Because we conclude that the legislature did not intend to make MRTA applicable to sovereignty lands, we do not address the second prong of whether the legislature could constitutionally make such an ex post facto divestment of sovereignty lands without explicitly basing it on the public interest. We note, however, although article X, section 11 of the Florida Constitution was adopted after the passage of MRTA, that section 11 is largely a constitutional codification of the public trust doctrine contained in our case law.

Finally, we agree with the district court in *Mobil Oil* that respondent Mobil's counterclaim was *in rem* in nature and local only to Polk County Circuit Court.

In summary, we hold that conveyances of swamp and overflowed lands do not convey sovereignty lands encompassed therein, that such conveyances without exemption of sovereignty lands do not legally estop the state from asserting title to sovereignty lands, and that MRTA, as originally enacted and subsequently amended in 1978, is not applicable to sovereignty lands.

We approve that portion of *Mobil Oil* holding that jurisdiction rested in Polk County and quash the remainder. We quash entirely *Coastal Petroleum v. American Cyanamid.* The cases are remanded for further proceeding consistent with this opinion.

It is so ordered.

ADKINS, OVERTON and EHRLICH, JJ., concur.

BOYD, C.J., dissents with an opinion, in which McDONALD, concurs in part and dissents in part with an opinion.

Not final until time expires to file rehearing motion and, if filed, determined.

BOYD, Chief Justice, dissenting.

Because I find that the circuit court and the district court were correct in their resolution of these quiet-title lawsuits, I must respectfully dissent. I can find no basis for holding that the deeds to the lands in question in these cases, which were duly executed by authorized public officials over one hundred years ago, may now be called into question under the public-trust doctrine or any other theory. I would approve the decisions of the district court of appeal.

The petitioners argue that the lands at issue in these quiet title actions, or some portions of them, lie below the high water marks of and thus constitute parts of the beds of certain rivers and streams that are in fact navigable and are therefore the property of the state by virtue of the public trust doctrine. The petitioners assert that the Trustees of the Internal Improvement Fund did not have authority to alienate lands underlying the waters of inland rivers and streams at the time of the execution of the Trustees' deeds forming the origins of the chains of title under which the various respondents claim ownership of the lands in question.

The essential fact upon which this case turns is that the lands were conveyed into private ownership without

reservation of those portions underlying navigable waters. The legal descriptions in the deeds constituting the origins of the chains of title under which the respondents claim encompassed the lands in question. These deeds described the property to be conveyed by reference to the official government survey. These government surveys were made for the purpose of determining the proper classification of public lands in Florida, including a determination of what lands were swamp and overflowed lands and where navigable rivers and other bodies of water were located. The official surveys made in Florida were used by state and federal land officials as the basis for selecting the parcels to be patented to the state by the United States government as swamp and overflowed lands. *South Florida Farms Co. v. Goodno*, 84 Fla. 532, 94 So. 672 (1922). The original United States government surveyors were instructed to locate and meander all navigable rivers and other bodies of water. *Lopez v. Smith*, 145 So.2d 509 (Fla. 2d DCA 1962). The official surveys containing no meandering showing navigable rivers, the federal patents issued pursuant to congressional authorization under the Swamp and Overflowed Lands Act of 1850, the official state requests for such patents, and the Trustees' deeds of the lands in question as swamp and overflowed lands, taken together, constitute official, contemporaneous determinations that the lands in question were swamp and overflowed lands and that any waters lying thereon were not navigable. The Trustees' determination that land is of a character that gives them the authority to sell it is not subject to collateral attack. *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933).

The cases upon which the petitioners place their principal reliance are *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927); *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909); and *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908). However, many of the principles

of law stated in these cases have been modified or at least qualified by later decisions. Moreover, these cases are factually distinguishable from the present case.[1] At the least it can readily be said that none of these cases supports the proposition that land underlying a navigable river or stream simply cannot, as a matter of law, be conveyed into private ownership. To the contrary, the cited cases recognize that such lands, notwithstanding the fact that the state may have obtained title by virtue of its sovereignty, may be conveyed when the authority and intention to do so are clear. As has already been shown, there was authority and intent to convey the lands in question.

Numerous cases recognize that the state may convey the title to submerged sovereignty lands into private ownership, so long as the public trust safeguarding the rights of the public to the use and benefit of the waters is not violated. *See, e.g., Gies v. Fischer*, 146 So.2d 361 (Fla.1962); *Holland v. Fort Pierce Financing & Construction Co.*, 157 Fla. 649, 27 So.2d 76 (1946); *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933); *Tampa N.R.R. v. City of Tampa*, 104 Fla. 481, 140 So. 311 (1932); *State ex rel. Buford v. City of Tampa*, 88 Fla. 196, 102 So. 336 (1924). The right of the public to the use of the water is the inalienable portion of sovereign ownership under the public trust doctrine. Florida law has long recognized that it is not necessary for the state to retain absolute ownership of the bed of a river in order to retain the control of the use of the surface waters for the benefit of the public.

The petitioners argue that the trial court should have allowed them to present evidence that the lands in question are under waters that were in fact navigable at the

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[1] An obvious distinction is that the most recent of the cited cases was decided nearly sixty years ago. None of these cases involved nearly one hundred years of state acquiescence in a private person's exercise of ownership rights over the lands in question.

time of the original deeds from the state. Such evidence, they argue, would overcome the presumption of non-navigability arising from the lack of meandering in the survey. The fact of navigability at that time, they argue, would establish that the trustees had no authority to deed the river beds and would establish the sovereignty land reservation which they say exists as a matter of law. However, summary judgment without receiving such evidence was proper.

The title to land should rest upon a grant, not upon an evidentiary fact. *Pembroke v. Peninsular Terminal Co.* As I have stated above, the Trustees in making the deeds from which the respondents' titles derive made official determinations of the character of the lands and those determinations are not now subject to question. The petitioners have cited the noted treatise by Dean Maloney and others [2] for the proposition that the early official surveyors encountered difficulties which may account for the lack of meandering of rivers later known to be navigable in fact. Actually, the cited work offered this historical observation as a possible explanation for the fact that so many of Florida's inland lakes were not shown on the surveys. It is highly unlikely that the surveyors would have allowed the problems of swampy shorelines, snakes, and other hazards to deter them from noting the presence of an obviously navigable river. Thus it is appropriate to apply the concept stated in *Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla.1977), that we should presume that the official surveyors did their work correctly, conscientiously, and as instructed.

The majority accepts the petitioners' argument that the trial court's judgment quieting title to the lands in question in the respondents violates the public trust doctrine by divesting the public of its common-law rights to

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[2] F. Maloney, S. Plager, and F. Baldwin, *Water Law and Administration: The Florida Experience* (1968).

the use and benefit of navigable waters. However, there is no such divestment of the public rights of use and benefit of the waters.

Contrary to the assertions of the petitioners and as discussed above with citations of authority, a determination that the bed of a river or stream is in private ownership does not divest the public of its rights in the use and benefit of the water for purposes such as transport, fishing, floating, and swimming if the river or stream is in fact useful for such purposes. When a riparian owner holds title to the land between high-water mark and the thread of the stream (or owns both banks and the bed from high-water mark to high-water mark), such title is held subject to the servitude in favor of the public to pass over the water in boats if such use of the water is possible. Moreover, the public right does not depend on the river being in fact navigable in the sense of being useful for navigation for commercial purposes. Thus, to the extent that the original Trustees' deeds are taken as a determination that the rivers were not navigable, any such determination has no effect on public rights in the waters today if the waters are now in fact useful for navigational purposes. The Trustees deeded away only the proprietary interest in the submerged land. The right to the use of the overlying waters was inalienable under the public trust doctrine. Even if a river or stream is not navigable in the commercial sense but is used or useful for lesser degrees of navigation by small vessels, such as boats, canoes, and rafts, commonly employed in the recreational uses of rivers and streams, then the public retains the right to the use of the waters for such purposes. *See, e.g., Elder v. Declour*, 364 Mo. 835, 269 S.W.2d 17 (1954).

Even were I to agree that the Trustees needed and lacked specific legislative authority to execute the deeds in question on the ground that the properties were sovereignty lands rather than swamp and overflowed lands,

I believe that the doctrine of estoppel would support the lower courts' declaration of respondents' ownership. Florida law recognizes that where a grantor conveys land by mistake, he is estopped to later deny that he intended the conveyance as expressed in the deed. This principle has been applied in a case where the Trustees not only made a mistake, but asserted that they lacked legislative authority to convey the lands in question. *Trustees of the Internal Improvement Fund v. Lobean*, 127 So.2d. 98 (Fla.1961). *See also Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10 (Fla. 1969); *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (Fla.1956). Moreover, a deed will be held valid if the grantor, lacking authority to make the deed at the time, later acquires title or acquires the authority to alienate the property. That situation also obtains here.

The circumstances of these cases show that the doctrine of estoppel is properly applied here; these are classic cases for application of the doctrine of estoppel. The deeds were executed in 1883. At various times following that date, the respondents or their predecessors in title engaged in acts evincing the intent to exercise dominion and control over the lands in question. Some of the respondents or their predecessors in title have engaged in mining operations on the lands in question. If the Trustees disputed the respondents' title, they should have taken action to enjoin such operations and to evict the respondents long before this. The law should not come to the aid of one who is not diligent in asserting his own rights.

The respondents' "sovereignty-lands" argument fails for another reason. In 1819, the territorial legislature of Florida adopted a statute declaring the common law of England to be of force in Florida. The statute, in modified form but unchanged as to substance, is still in effect and is now codified in section 2.01, Florida Statutes (1985), and provides as follows:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Thus English common-law rules concerning land ownership and land transfers, as they developed up until July 4, 1776, were, have been, and continue to be the law in Florida unless and until modified by statute or court decision.

Even if we accept, as the majority does, the proposition that title to lands underlying navigable rivers was vested in the state upon admission into the Union, this does not compel acceptance of the further proposition that such lands were then inalienable under the public trust doctrine. From medieval times right on through the eighteenth century, the common law of England recognized land grants and land deeds vesting title to land underlying non-tidal but navigable rivers in private riparian owners. *See Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891). Therefore, at the time of Florida's admission into the Union, there was no impediment to the execution of deeds of such lands into private ownership. The fact that in other American jurisdictions, courts modified the English common law by imposing a public trust on the state's ownership of such lands, *see, e.g., Illinois Central R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892), could not have affected the land law of Florida, which still followed the English common-law rules. The earliest Florida court decision the majority is able to cite in support of the existence of the public trust doctrine is *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893), which was not decided until *after* the execution of the deeds in question in these cases.

In addition to the common-law rule allowing for grants of river bottom land to riparian owners, notice should also be taken of the effect of chapter 791, Laws of Florida (1856), in which the state expressly divested itself of and granted to riparian landowners "all right title and interest to all lands covered by water, lying in front of any tract or land . . . lying upon any navigable stream . . . as far as the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors." Sixty-five years later, the legislature amended the statute to provide that the title would not vest unless and until such a riparian owner had filled in or permanently improved such submerged land. Ch. 8536, Laws of Fla. (1921). But in the meantime, many riparian proprietors, in reliance on the 1856 legislation, had exercised dominion and control over various lands underlying navigable waters, for purposes other than the building of wharves and so forth, as envisioned when the 1856 legislation was passed. Decisions of this Court construing the 1856 act recognized that the state could grant the proprietary interest in the submerged lands without violating the public trust for protection of public rights in the use of the waters. *See, e.g., Alden v. Pinney*, 12 Fla. 348 (1869); *Geiger v. Filor*, 8 Fla. 325 (1859).

The decisions of The Florida Supreme Court from 1856 up until 1893 demonstrate that Florida followed the English common-law rules that land under navigable tide waters was titled in the sovereign, but could be alienated subject to public rights of navigation and fishing; and that the title to land underlying navigable inland rivers could be held in private hands subject to similar public rights. *See State v. Black River Phosphate Co.*, 27 Fla. 276, 9 So. 205 (1891); *Bucki v. Cone*, 25 Fla. 1, 6 So. 160 (1889); *Sullivan v. Moreno*, 19 Fla. 200 (1882); *Rivas v. Solary*, 18 Fla. 122 (1881).

As the foregoing discussion of legal authorities shows, the suggestion that the state must hold title to all lands

underlying navigable rivers and streams in order to protect the rights of the public to the use and enjoyment of the waters is based on a misconception. As in any other areas of property law, the law recognizes various degrees of legal rights and interests in the same property and does not demand that one person hold the entire "bundle of sticks." The sovereign trust in favor of the public to use navigable waters for fishing, navigation, and recreation can be preserved inviolate even though the beds of such rivers and streams be titled in private owners.

Some of the petitioners and *amici curiae* in these cases, as well as observers in the communications media and among the public generally, have inaccurately suggested that the state must have title in order to protect wetlands from environmental damage. However, the legal proposition that parts of the lands underlying rivers or streams are in private ownership has nothing whatsoever to do with the plenary power of the legislature to regulate the use of such property for the purpose of protecting the natural environment. The scope of that regulatory authority is very broad and fully adequate to the purpose of protecting Florida's environment against harmful activities. *See, e.g., Atlantic International Investment Corp. v. State*, 478 So.2d 805 (Fla.1985); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.1981), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1982).

Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money. If the Board of Trustees is able on remand to succeed in showing the rivers in question to have been in fact navigable in 1845, then the Board's title to the submerged lands will be confirmed. In that case the Board's leases to Coastal Petroleum may be held valid. Contrary to suggestions of ecological concern, there is no showing that if the board prevails, phosphate mining will cease. As lessee, Coastal Petroleum's only interest in

these lands is to extract mineral royalties. Thus any lingering notions that these cases concern ecology should be dispelled. These cases concern money and the question of who gets it.

Much has been written and spoken, in the communications media and elsewhere, concerning the legal issues in this case and the related political issues. Many have suggested that the courts are being asked to give away state-owned lands. The truth is that the lands in question here, as well as other lands, were legally conveyed by authorized state officials. It may very well be the case that in doing so, public officials failed to exercise care and diligence on behalf of the public. But the fact that decisions of former officials were unwise is no reason to now penalize innocent purchasers who paid market value and relied upon state officers' authority to sell. I can see no constitutionally permissible basis for the state to recover such lands except by purchase or by eminent domain based on a public purpose and the payment of just compensation.

There has also been much public discussion of the effect of the Marketable Record Title Act. I agree with the district court's holding that MRTA applies with the same force to land claims of the state as to those of private claimants. The law was intended to apply and should apply to all real estate claims without an exception for those of the state. Under MRTA, the claims of the state in these cases are asserted too late and cannot be revived. If private claimants were to seek to call into question the deeds of an ancestor given over one hundred years ago, based on mistakes, reservations or infirmities not preserved by re-recording under the statute, such claims would be barred under MRTA. The same rule should apply against the state because of the overriding interest in the stability and marketability of land titles.

Constitutional protection of private property rights is an essential feature of our form of government and our

society. Whenever the awesome power of government is used to extract from people their lives, liberties, or property, their only refuge is in the courts. The circuit court orders in these cases correctly preserved the vested rights of real property owners against attempted state confiscation. The district court was in my view correct in affirming those circuit court judgments. I would approve the district court decisions. I therefore respectfully dissent.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part and dissenting in part.

I concur with Justice Boyd's dissent on all issues except to the effect of the Market Record Title Act. I do not believe it applicable to the beds of navigable rivers and streams and would not extend *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla.1977) beyond the facts of that case.

APPENDIX B

SUPREME COURT OF FLORIDA
WEDNESDAY, AUGUST 27, 1986

Case No. 65,696

District Court of Appeals,
2d District—Nos. 83-1425 & 83-1478

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

Case No. 65,755

District Court of Appeal,
2d District—Nos. 83-1378 & 83-1413

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,

v.

AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

Case No. 65,913

District Court of Appeal,
2d District—No. 82-2050

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,

v.

MOBIL OIL CORPORATION,
Respondent.

Upon consideration of the Motions for Rehearing filed in the above causes by attorneys for AMERICAN CYANAMID COMPANY, ESTECH, INC. and MOBIL OIL CORPORATION, and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied.

ADKINS, OVERTON, EHRLICH and SHAW, JJ., concur.

MCDONALD, C.J. and BOYD, J., dissent.

APPENDIX C

MANDATE
SUPREME COURT 0F FLORIDA

To the Honorable, the Judges of the District Court of Appeal, Second District,

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WHEREAS, in that certain cause filed in this Court styled:

COASTAL PETROLEUM CO.

v.

AMERICAN CYANAMID CO., *et al.*;

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA

v.

AMERICAN CYANAMID CO., *et al.*;

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA

v.

MOBIL OIL CORPORATION

Case No. 65,696, 65,755, 65,913
Your Case No. 83-1425, 83-1478, 83-1378, 83-1413, 82-2050

The attached opinion was rendered on May 15, 1986,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Parker Lee McDonald, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 27th day of August 1986.

/s/ Sid J. White
Clerk of the Supreme Court
of Florida

APPENDIX D

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

No. 82-2050

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Appellant,

v.

MOBIL OIL CORPORATION,
Appellee.

July 13, 1984

Rehearing Granted Sept. 4, 1984

HOBSON, Acting Chief Judge.

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida ("Trustees"), co-defendant below in a quiet title action, appeals a final summary judgment order rendered in favor of Mobil Oil Corporation ("Mobil"), plaintiff below. We affirm.

In April 1982, Mobil, a New York corporation engaged in the mining and processing of phosphate rock in Polk County, Florida, initiated an *in rem* action in the Circuit Court of the Tenth Judicial Circuit in and for Polk County against the Trustees and Coastal Petroleum Company ("Coastal"), a Florida corporation involved in

ventures in Polk County similar to those of Mobil. Mobil's complaint sought to quiet title to certain submerged lands coursed by the Peace River between Bartow and Fort Meade in Polk County. The Trustees, who are the trustees of state owned lands, submitted a motion to dismiss Mobil's complaint, or, in the alternative, to stay the proceedings. Their motion in the alternative alleged that an action involving the same parties and the same title issues was pending in the Circuit Court of the Second Judicial Circuit in and for Leon County, and that, as a result, the Leon County Circuit Court had either exclusive jurisdiction to try the title issues presented, in which case a dismissal was appropriate, or exclusive venue, in which case a stay was appropriate.

The Leon County Circuit Court case referred to in the Trustees' motion in the alternative originated several years before the Polk County Circuit Court *in rem* action. In September 1976, Mobil instituted a contract action against Coastal asserting that Coastal had violated a sublease issued to Mobil for oil and gas exploration upon lands located beneath the Peace River in Polk County. Coastal then filed a counterclaim alleging that Mobil had converted phosphate ore and other minerals from these leased, submerged lands, which Coastal contended were owned by the state. Coastal joined as a necessary party to this counterclaim the Trustees. Mobil subsequently filed a reply counterclaim against Coastal and the Trustees seeking a declaratory judgment to remove a cloud on the title to a parcel of submerged land similarly situated to the submerged lands at issue in the conversion claim.[1]

Although the parcel of real estate which is the subject of Mobil's reply counterclaim in the still pending Leon County Circuit Court proceeding is not included within the submerged lands at issue in the Polk County Circuit

[1] It is unclear from the record on appeal whether Mobil's reply counterclaim was permissive or compulsory in nature.

Court quiet title action, it is similarly situated to the submerged lands at issue in the Polk County Circuit Court case. Moreover, the title issues raised in both the reply counterclaim and the quiet title action are identical.

Mobil responded to the Trustees' motion in the alternative by contending that the Polk County Circuit Court was the only court which could grant Mobil the complete relief it was seeking, *i.e.*, a binding *in rem* decree quieting the title to the submerged lands, because, in its view, the Polk County Circuit Court was the only court which had *in rem* jurisdiction to try the issue of title to the Polk County real property described in Mobil's complaint.

The Polk County Circuit Court subsequently rendered an order denying the Trustees' motion in the alternative. The same court thereafter issued a final summary judgment order in Mobil's favor which the Trustees now appeal.

Because the title issues presented by Mobil's reply counterclaim in the Leon County Circuit Court case are the same as those involved in the Polk County Circuit Court action, and because service of process was first perfected in the Leon County Circuit Court case, the Trustees basically argue on appeal from the procedural angle that the Polk County Circuit Court erred by denying their motion in the alternative. In support of their stand they cite *Mabie v. Garden Street Management Corp.*, 397 So.2d 920 (Fla. 1981), for the proposition that when separate actions addressing identical issues are pending between the same parties in courts of concurrent jurisdiction, exclusive jurisdiction to try those issues lies with the court in which service of process was first effectuated.[2] Mobil answers that *Mabie's* "rule of priority" is inapplicable here. It explains away *Mabie* by pointing out that, unlike the situation at bar, the separate actions

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[2] The Trustees assert that Mabie's "rule of priority" is one of exclusive venue, not exclusive jurisdiction.

in *Mabie* were "transitory" in nature, as opposed to "local" in nature. Relying on *Lakeland Ideal Farm & Drainage District v. Mitchell*, 97 Fla. 890, 122 So. 516, 518-19 (1929), it maintains that the common law "local action rule" requires that its suit to quiet title to the submerged lands in issue could be brought only in Polk County, the county where the lands in question are located. It thus concludes that the Polk County Circuit Court did not err in denying the Trustees' motion in the alternative.

The Trustees construe the rule of priority's concept of "concurrent jurisdiction" to mean that in suits serving "substantially the same purpose," which they say is the situation regarding Mobil's reply counterclaim in the Leon County Circuit Court proceeding and Mobil's quiet title action in the Polk County Circuit Court case, the courts involved need not have concurrent jurisdiction over the subject matter, but need merely have concurrent jurisdiction to determine the issues. Since the Leon County Circuit Court has jurisdiction over the type of case represented by Mobil's reply counterclaim, they conclude that the Leon County Circuit Court should have been allowed to decide the title issues to the exclusion of the Polk County Circuit Court.

The Trustees' interpretation of the rule of priority's concept of concurrent jurisdiction suffers from two interrelated flaws, the second of which very probably caused the first: first, it ignores that the rule does not even come into play unless the court which initially tries to exercise jurisdiction at least has subject matter jurisdiction; second, it fails to recognize that in an *in rem* action there are two prongs to the definition of subject matter jurisdiction.

The ultimate purpose behind the rule of priority is comity; to prevent collision and conflict in the execution of judgments by independent courts of coordinate power. If the court which first attempts to exercise jurisdiction

does not have subject matter jurisdiction, it cannot be said to have concurrent jurisdiction with a court which does have subject matter jurisdiction. In such a situation, there is simply no need to invoke the rule, and, as a result, the court which does have subject matter jurisdiction is free to exercise jurisdiction and to subsequently enter a final judgment.

In *Mabie*, as well as in the various other cases cited by the Trustees where the rule of priority was employed, *Benedict v. Foster*, 300 So.2d 8, 10 (Fla. 1974), *Taylor v. Cooper*, 60 So.2d 534, 535-36 (Fla. 1952), *Ullendorff v. Brown* 156 Fla. 655, 24 So.2d 37, 39-40 (1945), *Martinez v. Martinez*, 153 Fla. 753, 15 So.2d 842 (1943), *DiProspero v. Shelby Mutual Insurance Co.*, 400 So.2d 177, 179 (Fla. 4th DCA 1981), *Royal Globe Insurance Co. v. Gehl*, 358 So.2d 228, 229 (Fla. 3d DCA 1978), *Hogan v. Millican*, 209 So.2d 716, 718 (Fla. 1st DCA 1968), and *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925 (3d Cir. 1941), the court which first attempted to exercise jurisdiction had subject matter jurisdiction. *See also Hunt v. Ganaway*, 180 So.2d 495 (Fla. 1st DCA 1965), *disapproved on other grounds, Mabie.* More to the point, in cases involving real property where the rule was applied, the court which first tried to exercise jurisdiction had subject matter jurisdiction. *See Farmers' Loan & Trust Co. v. Lake Street Elevated Railroad Co.*, 177 U.S. 51, 20 S.Ct. 564, 44 L.Ed. 667 (1900); *Ray v. Williams Phosphate Co.*, 59 Fla. 598, 52 So. 589 (1910); *DiProspero; Blake v. Blake*, 172 So.2d 9 (Fla. 3d DCA 1965).

Where the cause of action is *in rem*, as is the case regarding Mobil's reply counterclaim,[3] the court involved

[3] "An action involves title to real estate 'only where the necessary result of the decree or judgment is that one party gains or the other loses an interest in the real estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the judicial determination of such rights.'" *In re Weiss'*

has subject matter jurisdiction only if it has 1) jurisdictional power to adjudicate the class of cases to which the cause belongs *and* 2) jurisdictional authority over the land which is the subject matter of the controversy. *See Lovett v. Lovett*, 93 Fla. 611, 112 So. 768, 775 (1927). Although the Leon County Circuit Court has jurisdictional authority to adjudicate the type of action represented by Mobil's reply counterclaim,[4] it does not have jurisdictional power over the Polk County parcel of land which is the subject matter of Mobil's reply counterclaim.

Florida's constitution delegated the legislature with the mandatory responsibility of dividing the state into judicial circuits along county lines. *See* Art. V, § 1, Fla. Const. (1968). Acting pursuant to the command of the constitution, the legislature divided the state into twenty judicial circuits along county lines. *See* § 26.01, Fla.Stat. (1981). By the very act of providing for this type of division of the state into judicial circuits, the constitution clearly contemplated territorial limitations upon each circuit court. The geographical boundaries of a circuit court along county lines were designed and prescribed with a definite object in view—to constrict the extent of

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Estate, 106 So.2d 411, 415 (Fla. 1958), quoting from *Barrs v. State ex rel. Britt*, 95 Fla. 75, 116 So. 28, 29 (1928).

[4] A perusal of revelant statutory authority readily reveals that the Leon County Circuit Court has jurisdictional power to adjudicate the class of cases to which Mobil's reply counterclaim belongs. The circuit courts have exclusive original jurisdiction in all cases in equity and in law involving the title of real property. *See* § 26.012(2)(c) and (g), Fla.Stat. (1981). The circuit courts also have jurisdiction to declare rights, status and other equitable or legal relations. *See* § 86.011. More specifically, any party who may be in doubt about his rights under a deed, as is Mobil, may have determined any question under such deed and obtain a declaration of rights, status or other equitable or legal relations thereunder. *See* § 86.021. In addition, further relief based on a declaratory judgment may be granted when necessary and proper upon an application by motion to the court having jurisdiction to grant relief. *See* § 86.061.

a circuit court's operation and authority. Needless to say, Leon County and Polk County are in separate judicial circuits. *See* § 26.021.

The local action rule in Florida is that where land lies outside a circuit court's territorial jurisdiction, and the purpose of an action is to determine the question of title to the land, as is the case regarding Mobil's reply counterclaim, the action is local to the circuit in which land lies. *Lakeland Ideal Farm & Drainage District. See also Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 147 So. 267 (1933); *Largo Land Co. v. Skipper*, 98 Fla. 541, 123 So. 915 (1929); *George v. Gustinger*, 350 So.2d 574, 575 (Fla. 3d DCA 1977); *Hendry Corp. v. State Board of Trustees of the Internal Improvement Trust Fund*, 313 So.2d 453 (Fla. 2d DCA 1975).[5]

The local action rule in Florida is one of subject matter jurisdiction, not venue, although the Trustees suggest otherwise. Indeed, the rule is rooted in the second part of the *in rem* definition of subject matter jurisdiction which requires that the court have jurisdictional authority over the land which is the subject matter of the controversy. Moreover, our state supreme court remarked as follows in *Lakeland Ideal Farm & Drainage District:*

> The [venue] statutes . . . affect only the venue of actions. The authority of the [venue] statutes . . . necessarily presupposes that the court in which the action is brought possesses jurisdiction of the *subject-matter* of the action as well as of the parties. Those statutes do not purport to confer generally

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[5] *See also The Northern Indiana Railroad Co. v. The Michigan Central Railroad Co.*, 15 How. (56 U.S.) 233, 14 L.Ed 674 (1853); *Massie v. Watts*, 6 Cranch (10 U.S.) 148, 3 L.Ed. 181 (1810); *Johnson v. Dunbar*, 114 N.Y.S.2d 845 (N.Y.Sup.Ct. 1852), *aff'd*, 282 A.D. 720, 122 N.Y.S.2d 222 (1953), *aff'd* 306 NY. 697, 117 N.E.2d 801 (1954).

> extra-territorial jurisdiction as to subject-matter located in another county, nor to change existing rules with reference to the locality of actions which in their essential nature are local and therefore must be brought in a court having jurisdiction of the subject-matter as well as of the parties.

122 So. at 518. In *Hendry Corp.*, this court echoed the above statement in *Lakeland Ideal Farm & Drainage District* by noting that "the local action rule is itself a limitation on the statutory rule as to venue." 313 So.2d at 455.[6]

Since the local action rule in Florida is a rule of subject matter jurisdiction, not venue, Mobil did not "waive" the rule by submitting its reply counterclaim to the Leon County Circuit Court, because subject matter jurisdiction cannot be conferred by waiver or consent. *See, e.g., Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. State*, 295 So.2d 314 (Fla. 1st DCA 1974).

In sum, the Leon County Circuit Court lacks jurisdiction of the subject matter of Mobil's reply counterclaim for the reason that the counterclaim is *in rem* in nature and local to the Polk County Circuit Court. *See Cohen v. Century Ventures, Inc.*, 163 So.2d 799 (Fla. 2d DCA 1964). Because the Leon County Circuit Court lacks jurisdiction over the subject matter of Mobil's reply counterclaim, the rule of priority is inapplicable.[7] Hence, the Polk County Circuit Court did not err in denying the Trustees' motion in the alternative and in proceeding to render a final judgment.

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[6] *See also Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 15 S.Ct. 771, 30 L.Ed. 913 (1895).

[7] We suggest that the Leon County Circuit Court notice the defect of want of jurisdiction as regards Mobil's reply counterclaim and enter an appropriate order. *See Bohlinger v. Higginbotham*, 70 So.2d 911 (Fla. 1954).

The Trustees' three remaining arguments on appeal relate to the substantive question of whether the Polk County Circuit Court erred in granting Mobil's motion for summary judgment as to the title issues. These issues, however, have been decided adversely to the Trustees in *Coastal Petroleum Co. v. American Cyanamid Co., et al.* 454 So.2d 6 (Fla. 2d DCA 1984) (questions certified). Therefore, we do not address those questions here.

Accordingly, the final summary judgment order is affirmed.

AFFIRMED.

DANAHY and LEHAN, JJ., concur.

APPENDIX E

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Nos. 83-1378, 83-1413, 83-1425
and 83-1478

COASTAL PETROLEUM COMPANY, AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellants,

v.

AMERICAN CYANAMID COMPANY, a Maine Corporation,

Appellee.

and

COASTAL PETROLEUM COMPANY, AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellants,

v.

ESTECH, INC., a Delaware corporation,

Appellee.

July 13, 1984

PER CURIAM.

Coastal Petroleum Company and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida were codefendants below in separate

quiet title actions. They appeal the summary final judgments rendered in favor of American Cyanamid Company and Estech, Inc., plaintiffs below. We affirm.

In 1883 the Trustees deeded certain land in Polk County as swamp and overflowed lands to plaintiffs' predecessors in title. These lands included some areas of the riverbed of the Peace River. Plaintiffs deraigned their titles from these deeds, which contained no reservations of any right, title or interest by the Trustees. In these actions, they sought to quiet title to these lands pursuant to chaper 65, Florida Statutes (1981).

As a starting point for our discussion, it should be recalled that the State of Florida was admitted to the Union by Act of Congress approved March 3, 1845. In 1850 the United States Congress enacted the Swamp Lands Act, granting to the various states of the union swamp and overflowed lands, which were unfit for cultivation and unsold on or after September 28, 1850. 43 U.S.C. § 982 (1964) (effective September 28, 1850). In 1857 patents for the lands here involved were issued to the state pursuant to the 1850 act. Prior to issuance of these patents, the Florida General Assembly had vested the power of sale over all swamp and overflowed lands in the Trustees. Ch. 610, §§ 1 & 2, Laws of Fla. (1855).

In 1977 Coastal Petroleum filed several suits in the United States District Court in Leon County, Florida, against plaintiffs. Coastal sought to recover damages for the alleged conversion of phosphate from these lands. Coastal Petroleum claimed the lands were state owned sovereignty lands subject to a lease between it and its lessor, the Trustees, entered into in 1946. We are advised that these federal cases are now pending.

After Coastal initiated the litigation in the federal court, plaintiffs, in 1982 and 1983, filed quiet title suits in the Polk County Circuit Court seeking to confirm their ownership of the lands at issue. They also sought to re-

move the cloud created by Coastal's claim that the lands were state owned sovereignty lands subject to Coastal's lease.

Coastal moved to dismiss the suits to quiet title based on *Mabie v. Garden Street Management Corp.*, 397 So.2d 920 (Fla.1981). The trial court denied the motion. Plaintiffs then filed motions for summary judgment. The trial court granted these motions because, under the doctrine of legal estoppel, the conveyances of the lands by the United States and the State of Florida vested fee simple title in the plaintiffs. Coastal and the Trustees filed timely appeals from both summary final judgments. For purposes of oral argument, the appeals were consolidated. Since these cases involve identical issues, we address them in a single opinion.

Defendants raise several points. Initially, they assert the trial court should have dismissed the case for improper venue. This issue, however, has been decided adversely to appellants in *Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp.*, 455 So.2d 412 (Fla.2d DCA 1984), so we do not address it here.

In arguing that the trial court erred in entering the judgments, the Trustees raised three substantive questions:

1. Do the 1883 swamp and overflowed lands deeds issued by the Trustees include sovereignty lands below the ordinary high-water mark of navigable rivers where the Trustees held no title to such sovereignty lands at the time of the conveyances?
2. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the Trustees' assertion of title to sovereignty lands?
3. Does the Marketable Record Title Act, chapter 712, Florida Statutes, operate to divest the

Trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?

In its brief, Coastal raises the additional point that the trial court erred in disposing of this litigation by summary final judgment. That point, however, is subsumed by the three substantive questions raised by the Trustees, which we now briefly discuss.

1. *The sovereignty lands issue.*

As to the first issue, the trial court rejected the Trustees' argument that the plaintiffs took title with "notice of navigability" so that the Trustees' conveyances did not include sovereignty lands. *See Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla. 1976). The trial court observed that these lands were surveyed before they were conveyed into private ownership as swamp and overflowed lands; furthermore, no water courses on the lands were meandered by the original government surveyors. *Cf. Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909). The court determined that when the state later conveyed such lands as swamp and overflowed lands without limitation or reservation of state owned sovereignty lands, the lands so conveyed were not subject to any "notice of navigability." Similarly, the court held the same was true when the lands were conveyed by the United States Government patent without limitation or reservation. *Cf. Pierce v. Warren*, 47 So.2d 857 (Fla. 1950), *cert. denied*, 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350 (1951), and *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).

We agree with the above conclusions of the trial court. Section 197.228(2), Florida Statutes (1981), recognizes that this state's unconditional conveyance of land to private individuals without reservation of public rights is a contemporaneous finding that the land is not sovereignty land. Here, the Trustees conveyed the lands in question to private individuals as swamp and overflowed lands in 1883, without any reservation of rights in the

deeds. The contemporaneous findings made by the Trustees when they executed their conveyances and the decisions by the government surveyors not to meander any of these watercourses are not now open to question. Rather, at this late date, we must accept their actions as correct and accord the Trustees' conveyances the legal sanctity they deserve. *See Odom v. Deltona Corp.*, 341 So.2d at 984, 988-989.

2. *The legal estoppel question.*

While the trial judge considered each of the issues urged by the defendants, he apparently grounded the summary final judgments primarily on the principle of legal estoppel. We think the trial judge was correct in quieting the fee simple title in the plaintiffs on this basis. First, the court properly concluded that defendants are estopped from asserting any right or title in derogation of the 1883 deeds conveying swamp and overflowed lands. *Board of Trustees of the Internal Improvement Fund v. Lobean*, 127 So.2d 98 (Fla. 1961) (legal estoppel is determined by the intentions of the parties as expressed in the deed); *see also Florida Board of Forestry v. Lindsay*, 205 So.2d 358, 361 (Fla. 2d DCA 1967), and *City of Tarpon Springs v. Koch*, 142 So.2d 763 (Fla. 2d DCA 1962), *cert. discharged*, 155 So.2d 151 (Fla. 1963). Again, in addressing this issue, the Trustees urge that the lands were sovereignty in character, but they did not obtain title to them until the legislature enacted chapter 69-308 Laws of Florida. *See* § 253.12, Fla. Stat. (1971) (vesting title to submerged lands under navigable waters in the Trustees). Thus, they argue that they were without authority to ever convey title until more than eighty years after issuance of the deeds relied on by plaintiffs. Even assuming, arguendo, that the lands were sovereignty as opposed to swamp and overflowed lands, titles acquired by defendants to these lands after their conveyance to the plaintiffs inured to the benefit of the plaintiffs as grantees. *Daniell v. Sherrill*, 48 So.2d

736, 740 (Fla. 1950); *Spencer v. Wiegert*, 117 So.2d 221 (Fla. 2d DCA 1959), *cert. denied*, 122 So.2d 406 (Fla. 1960).

Accordingly, we hold that the doctrine of legal estoppel bars any claim of ownership by the Trustees, since they did not reserve any rights in the deeds to the plaintiffs' predecessors. It follows that Coastal Petroleum is also estopped from claiming any right or title against plaintiffs under its lease from defendants. *McAdoo v. Moses*, 101 Fla. 936, 132 So. 638, 640 (1931); *Key West Wharf and Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599, 610 (1912).

3. *Applicability of the Marketable Record Title Act.*

The final issue we address is whether the Marketable Record Title Act (MRTA), chapter 712, Florida Statutes, applies to the 1883 swamp and overflowed deeds. The legislature adopted MRTA in 1963. Section 712.02, Florida Statutes (1963) provides that any person whose chain of title extends from any title transaction recorded over thirty years has a marketable record title free and clear of all claims except those in 712.03. MRTA, however, does not affect the state's right, title or interest reserved in a patent or deed by which the state parted with title if the reservation is explicit. § 712.04, Fla. Stat. (1981); *Sawyer v. Modrall*, 286 So.2d 610 (Fla. 4th DCA 1973), *cert. denied*, 297 So.2d 562 (Fla. 1974). *See also Odom*, 341 So.2d at 989. *Accord Starnes v. Marcon Investment Group*, 571 F.2d 1369 (5th Cir. 1978).

After the supreme court decided *Odom*, the 1978 legislature amended section 712.03, Florida Statutes, to exempt state title to lands beneath navigable waters acquired by virtue of sovereignty. *See* § 712.03(7), effective June 15, 1978. The Trustees assert that the lands were sovereignty lands and thus exempted from MRTA's application by the 1978 amendment. As previously noted,

we agree with the trial court's determination that these lands were not sovereign in nature.

Even assuming, arguendo, the lands were sovereignty lands, we cannot agree with the Trustees. Rather, we align ourselves with the view recently expressed by the Fifth District Court of Appeal. There our sister court held that section 712.03(7) does not apply retroactively even where the Trustees themselves wrongfully issued a deed at the "root of title" prior to the initial passage of MRTA in 1963. *Board of Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Co.*, 414 So.2d 10 (Fla. 5th DCA 1982), *petition for review denied*, 432 So.2d 37 (Fla. 1983). Here, as in *Paradise Fruit Co.*, the Trustees executed the deeds, which are the plaintiffs' "root of title." § 712.01(2), Fla. Stat. (1981). Plaintiffs' titles under the 1883 deeds were perfected under MRTA, as enacted in 1963; therefore, retroactive construction of the amendment would unconstitutionally deprive them of rights vested in 1963. *Paradise Fruit Co.*, 414 So.2d at 11. *See also State Department of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. 5th DCA 1981). Consequently, MRTA vested title to these lands in the plaintiffs even if they were sovereignty lands.

Accordingly, we affirm the summary final judgments in each of the cases. However, because we recognize the significant impact of our decision on the riverbeds of the Peace River, we certify the following questions to the Supreme Court of Florida as questions of great public importance:

1. DO THE 1883 SWAMP AND OVERFLOWED LANDS DEEDS ISSUED BY THE TRUSTEES INCLUDE SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?

2. DOES THE DOCTRINE OF LEGAL ESTOPPEL OR ESTOPPEL BY DEED APPLY TO

1883 SWAMP AND OVERFLOWED DEEDS BARRING THE TRUSTEES' ASSERTION OF TITLE TO SOVEREIGNTY LANDS?

3. DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, OPERATE TO DIVEST THE TRUSTEES OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?

HOBSON, A.C.J., and SCHEB and LEHAN, JJ., concur.

APPENDIX F

TENTH JUDICIAL CIRCUIT
POLK COUNTY

Case No. GC-G-82-1089

MOBIL OIL CORPORATION

v.

COASTAL PETROLEUM COMPANY, *et al.*

July 30, 1982

OLIVER L. GREEN, JR., Circuit Judge.

Plaintiff, Mobil Oil Corporation, a New York corporation, together with its predecessor, Virginia-Carolina Chemical Company, will be referred to as Mobil. Defendants, 1) Coastal Petroleum Company, a Florida corporation, will be referred to as Coastal, and 2) The State of Florida, the Department of Natural Resources of the State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, will be referred to as the State.

This is a suit by Mobil under Chapter 65, Florida Statutes, to quiet its title to the lands described in Attachment A hereto with respect to claims made by Defendants. Mobil's recorded title in Polk County to the

lands is undisputed except as this title may be affected by sovereignty considerations and Lease 224-B. The lands were conveyed to Mobil's predecessors through various deeds issued by the State, through the Trustees of the Internal Improvement Fund and the Board of Education, in the late 1800's and early 1900's without recorded reservation of ownership interest or public rights. The State asserts an ownership interest to a portion of the lands by contending that the State's conveyances were void because the lands underlie navigable waterbodies, to-wit, the Peace and Alafia Rivers, and are therefore state-owned sovereignty lands which, at the time of the State's deeds to Mobil's predecessors, were not subject to conveyance into private ownership. The State further contends that Mobil and its predecessors are charged with visual notice of the characteristics of these waterbodies. The State first asserted their claim of ownership in 1977. It is undisputed that the official surveys of the lands in question, which were performed by United States government surveyors, did not list navigable waterbodies on the lands and did not meander any of the streams located thereon.

Coastal asserts an interest to the minerals in the lands claimed by the State, and in additional lands described in Attachment A hereto underlying streams and creeks that flow into the Peace and Alafia Rivers, by virtue of an oil and gas exploration lease (Lease 224-B) that it received from the Trustees of the Internal Improvement Fund in 1946. This lease purported to convey certain mineral rights to state-owned lands. Mobil's chain of title, as reflected by the public records of Polk County, predates Lease 224-B.

Mobil filed its motion for summary judgment, with supporting materials, on May 17, 1982. A hearing on the motion, at which all parties were represented, was held on June 19, 1982. By order dated June 14, 1982, the parties were notified that the matter would be con-

tinued for decision until after resolution of the then pending interlocutory appeals and upon consideration of all other pleadings then on file. The appeals have now been dismissed, and the Court has considered all materials or pleadings on file in this case. The Court concludes that there is no genuine issue of material fact, and that Mobil is entitled to prevail over Defendants as a matter of law. Consequently, Mobil's motion for summary judgment quieting its title to the lands described in Attachment A hereto against any and all claims of Coastal and the State should be and is hereby granted.

My findings are as follows:

(1) This Court has jurisdiction.

(2) Fee simple title to the lands described in Attachment A hereto is now, or was, or has been in Mobil during the period of its record title to the lands, without any recorded reserved interests in the State, and free of any legal claim of Coastal under Lease 224-B.

(a) United States Government surveys of the lands between 1850 and 1855 recited no navigable waterbodies on the lands and did not meander any of the streams.

(b) *Martin v. Busch*, 112 So. 274 (Fla. 1927), established the concept that a grantee of *unsurveyed* land bordering on an obviously navigable waterbody takes with notice that a conveyance of this land does not include the sovereignty land underlying the waterbody. This concept does not apply in the present case, where the land was surveyed *before* it was acquired by the State and conveyed by the State to the original grantee. *Pierce v. Warren*, 47 So.2d 857, 860 (Fla. 1950); *Odom v. Deltona Corp.*, 341 So.2d 977, 988-89 (Fla. 1976).

(c) The lands in question were originally conveyed many years ago by the federal government to the State without documented sovereignty limitations and were subsequently deeded to Mobil's predecessors in title either as swamp and overflow lands or internal improvement

lands by the State through the Trustees of the Internal Improvement Fund, or as school lands by the State through its Board of Education. As the State did not claim an interest in the lands before the 1970's, it cannot now claim ownership by questioning its own recitals, in its original deeds conveying the lands, that the lands were capable of being conveyed without reservation. *Odom v. Deltona Corp., supra; Trustees of Internal Improvement Fund v. Lobean*, 127 So.2d 98 (Fla. 1961); and *Daniell v. Sherrill*, 48 So.2d (Fla. 1950).

(d) In *Odom v. Deltona Corp., supra*, the Supreme Court recognized that Florida land titles would be thrown into turmoil if state officials were permitted to question the validity of surveys and deeds that are over 100 years old:

> Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; *otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights specifically reserved in such conveyances.*
>
> 341 So.2d at 989 (emphasis supplied).

(e) In *Odom v. Deltona Corp.*, supra, the Supreme Court refused to allow the Trustees of the Internal Improvement Fund to dispute the declaration in their deed that the land was swamp and overflowed land which was capable of being conveyed. The trial court, in language later approved by the supreme Court, had stated:

> This Court is in a poor posture to evaluate the work of those surveyors of many decades past. It can only be accepted that they did their job as instructed and recorded what they found then, which may or may not be what appears now. Fresh water lakes and ponds do change rather significantly because of both natural and artificial alterations in the areas involved. It is to be observed that governmental conveyances were made in reliance on them and the grantees of such conveyances had the right to assume the U.S. Government and the Trustees were acting lawfully.
>
> 341 So.2d at 984.

(f) In applying the doctrine of estoppel against the State in a virtually identical title dispute over submerged lands, Judge Stephenson of this Court held last year:

> [T]he Trustees are legally estopped to rebut the presumption of non-navigability after the government survey has stood unimpeached for so many years. The Trustees expressly stated in the initial deed that the land was swamp and overflow land, which by definition means it is not sovereignty land. . . . The Trustees are estopped from presenting the issue of sovereignty ownership for determination now by this Court.

American Cyanamid Company v. State Board of Trustees of the Internal Improvement Trust Fund, No. GCG-80-290, Final Judgment at p. 13 (Fla. 10th Cir.Ct. July 27, 1981).

(g) The state's selection and classification of the land as swamp and overflowed land constituted a proper exercise of power conferred by state statutes. Chapter 332, Laws of Florida (1850); Chapter 610, Law of Florida (1854-55). The physical character and legal classification

of the lands necessarily were also confirmed by federal authorities pursuant to the Swamp Lands Act of 1850, 9 U.S. Stat. 519, 43 U.S.C. § 981 *et. seq. McCormick v. Hayes*, 159 U.S. 332 (1895); *French v. Fyan*, 93 U.S. 169 (1876). These actions of duly constituted authority cannot here be questioned under Florida law. Section 197.228(2), Florida Statutes, provides that navigable waters in Florida "shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, *swamps or overflowed lands*, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state *without reservation of public rights in and to said waters.*" (Emphasis supplied.) In construing Section 197.228(2) to accord finality to swamp and overflow determinations made by prior officials, the Supreme Court has approved the following statement:

> *There is a recognition in Section 197.228(2) that an unconditional conveyance by the state or national government of a described area to private ownership without a specific reservation is in itself a contemporaneous finding that such area is not sovereignty property and that such finding should not be questioned.* The actions of duly constituted authority are recognized as entitled to be regarded as based on a proper exercise of powers conferred and not a usurpation or other illegal conduct.

Odom v. Deltona Corp., supra, at 984 (emphasis supplied). The same reasoning applies to and validates the state's classification and conveyance of those lands included in Attachment A hereto that were described as internal improvement lands or as school lands in the original conveyances by the State to Mobil's predecessors.

(h) Coastal, as a party in privity with the State, is legally limited in challenging the validity of the conveyances by the State and its departments or agencies to

Mobil's predecessors in title to the same extent as the State is limited, because "[i]t is well settled, also, that a person claiming title under one who is estopped will also be bound by the estoppel." *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599, 610 (1912); see also, *e.g.*, *McAdoo v. Moses*, 101 Fla. 936, 132 So. 638, 640 (1931); *Coral Realty Co. v. Peacock Holding Co.*, 103 Fla. 1916, 138 So. 662, 625 (1931).

(3) The deeds to Mobil's predecessors were effective to convey title to the lands, including all proprietary rights in the soil. The Court does not at this time determine whether any waterbodies on the lands are, or ever were, navigable in fact, because it is unnecessary to do so to decide this case. Even assuming that the lands at the time of the State's original conveyances were sovereignty in character and subject to a governmental trust for the preservation of public easements in the waters thereon, a conveyance of the State's proprietary interests in sovereignty property has long been recognized as proper under Florida law, subject only to the State's implied retention of necessary regulatory powers over such property. *See State v. Black River Phosphate Company*, 13 So. 640 (Fla. 1893); *Pembroke v. Peninsular Terminal Co.*, 146 So. 249, 263 (Fla. 1933); and *State ex rel. Buford v. City of Tampa*, 102 So. 366, 340-41 (Fla. 1924). So long as the right of public use of the navigable waterbody is preserved, the public trust is satisfied, irrespective of the title to the underlying bottom. *Holland v. Ft. Pierce Financing & Construction Co.*, 27 So.2d 76, 81 Fla. 1946). Since Mobil does not seek to quiet title against public use or other governmental rights, there is no need to decide how the deeds and other past conduct of state officials affected any such rights. Also, although not essential for determination in this action, this Court recognizes that once the State has parted with its proprietary interest in lands under navigable or non-navigable waters, it nevertheless retains authority to regulate activities in the waters or on adjoining wetlands to pro-

tect the public health, safety and welfare. *See Gies v. Fischer*, 146 So.2d 361, 363 (Fla. 1962) and *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981).

(4) Mobil's record title to each parcel of the lands in question is based on a continuous chain of recorded title transactions proceeding from a valid "root of title" which was recorded in Polk County for more than 30 years before the effective date of the Florida Marketable Record Title Act (the "MRTA"), Chapter 712, Florida Statutes. Although it is not essential to the judgment in this case, Mobil clearly also buttresses its marketable record title to the lands by virtue of the provisions of the MRTA. Even assuming that the land in question is sovereignty land (which, I repeat need not be and is not decided as an issue of fact in this case), the MRTA has consistently been construed to vest fee simple title as against a sovereignty ownership claim by the State or the Trustees. *Odom v. Deltona Corp., supra; Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Paradise Fruit Company, Inc.*, 7 F.L.W. 932 (Fla. 5th DCA April 28, 1982); *State Department of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. 5th DCA 1981); *State Board of Trustees of the Internal Improvement Trust Fund v. Laney*, 399 So.2d 408 (Fla. 3d DCA 1981); and *American Cyanamid Company v. State Board of Trustees of the Internal Improvement Trust Fund, supra.*

The attempted recording of Coastal's lease in Polk County in 1954 was insufficient to act as an exception to the marketability of Mobil's title to the lands. The attempted recording of an unexecuted printed, and conformed copy as an attachment to a royalty deed from Coastal to a third party does not constitute the recording of an adverse title transaction, as contemplated by the MRTA. The descriptions of the lands in the lease as "the bottoms of and water bottoms adjacent to" certain named

rivers "together with all connecting sloughs, arms and overflow lands located in such waters" is too vague and uncertain to enable the land to be identified and, therefore, the lease cannot qualify as an exception to marketability. *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Paradise Fruit Company, Inc., supra; American Cyanamid Co. v. State Board of Trustees of the Internal Improvement Trust Fund, supra.*

(5) Inasmuch as the State made no reservation of public ownership rights in the prior conveyances of these lands to Mobil and to its predecessors (of which Coastal had notice by virtue of the recording acts), any claim by Defendants based upon Lease 224-B is without foundation in law or in fact.

(6) Because it is unnecessary to my decision, I make no finding at this time (indeed, the facts may be controverted) on Mobil's claim that it has perfected title to the lands under the statutory doctrine of adverse possession.

It is, thereupon, ORDERED AND ADJUDGED that:

(a) Under principles of legal estoppel, as recognized, ratified and confirmed in the Florida Statutes, the conveyances by the State of the lands described in Attachment A hereto were valid and effective as against the Defendants to transfer title to the subject lands to Mobil's predecessors, and Mobil (or its grantees) for that reason is the owner in fee simple of all lands described in Attachment A hereto, said lands being located in Polk County, Florida.

(b) The fee simple title in and to the lands described in Attachment A hereto is hereby quieted in Mobil or in those claiming by, through or under it, as against Defendants. Mobil has been the owner of these lands from the date of their acquisition by Mobil by recorded deed, until the lands, or some of them, were conveyed to third parties, free and clear of any right, title, interest or

claim of any kind whatsoever by Defendants. Chapter 65, Florida Statutes (1981).

(c) The fee simple title in and to the lands described in Attachment A hereto also includes the entire ownership by Mobil of all proprietary rights in both the surface and subsurface of the lands.

(d) Mobil's fee simple title to the lands described in Attachment A hereto was acquired prior to and is superior in all respects to any rights granted to Coastal under Lease 224-B

(e) This final judgment does not extinguish any rights of the public to use the waters of the Peace or Alafia Rivers for boating, fishing, swimming, or other public purposes, nor does it establish any right in Mobil, or those claming by, through, or under it, to prevent or interfere with any such public use. It is not necessary in this case to now decide how the deeds and other past conduct of the State affected public use or other governmental rights in the Peace and Alafia Rivers because Mobil has excluded any such rights from the clouds it has sued to remove, and because the State has not alleged that Mobil has invaded such rights and has not sought affirmative relief from this Court (whose jurisdiction it denies) to declare or enforce such rights.

(f) This Court does not by this final judgment intend to interfere in any way with the lawful rights of the State, or any agency thereof, to exercise its environmental and other governmental powers over any waterbodies flowing through said lands, or to regulate those waterbodies for drainage, irrigation, pollution control, navigation, fishing, or other public purposes. This final judgment is also not intended to affect the rights of other riparian owners who are not parties to this action or of the public to the continued use of presently existing public rights of way on the lands.

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

Case No. 65,913

THE BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND,
Petitioner,

vs.

MOBIL OIL CORPORATION,
Respondent.

MOBIL OIL CORPORATION'S
MOTION FOR REHEARING

MOTION FOR REHEARING

> Substantive rules governing the law of real property are peculiarly subject to the principles of stare decisis.
>
> Adkins, J., in *Askew v. Sonson*, 409 So.2d 7, 15 (Fla. 1981).

Regrettably, the Court's decision in the *Coastal Petroleum* cases tells all who read it that the doctrine of stare decisis is optional in Florida today. In a strangely casual opinion,[1] the Court's majority *sub silentio* overrules three of its prior decisions.[2] It admits overruling none. To identify those precedents anonymously cast aside, one need only proceed to the dissenting opinion of Chief Justice Boyd.

This disposition is particularly troublesome in view of the Court's recent declarations, in ringing lines, that private property interests enjoy *some* measure of state-ordered[3] protection against governmental whim.[4]

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[1] For example, the majority opinion devotes only five sentences to the second certified question and ignores the Court's own precedent in Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961), which is silently overruled.

[2] *Lobean*, supra; Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977); Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249 (1933) (title to land should rest upon a grant, not upon an evidentiary fact).

[3] Fifth Amendment federal protection under the "taking" clause, applicable to state action through the Fourteenth Amendment, is also involved in these cases.

[4] "Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property

In order to arrive at the result reached in these cases, the majority has inadvertently created unexplained conflicts with the Court's own prior precedents. The majority has also obviously overlooked historical facts and circumstances that contradict its conclusions.

Even if the majority is not troubled by the chaos its decision will create in Florida real property law, it should be concerned about the retroactive effect of its decision. The Court has created the "inequitable" result feared by the majority report of the 1985-86 Marketable Record Title Act Study Commission.[5] Unless the Court at least modifies its decision to make it prospective only, it will expose landowners throughout Florida to damage claims based on the past use of land long believed by everyone, including the Trustees, to be in private ownership. By making its decision prospective only, the Court would protect the Trustees' ownership claims without penalizing landowners who relied upon the state's classification of the lands as non-sovereignty for over a hundred years.

Mobil moves for rehearing and urges the grounds that follow.

I.

The majority has misperceived this Court's prior opinion in *Odom v. Deltona Corp., supra.* The majority says that *Odom* involved a "factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands." *Both* sides in the present controversy have agreed that statement is simply not correct.

The Trustees asserted a "clear" position in their brief on the merits:

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rights which it now needs, these can be reacquired through eminent domain. . . ."

Boyd, J., in Odom v. Deltona Corp., 341 So.2d 977, 989 (Fla. 1977).

[5] See discussion at page 12, *infra.*

> It is also clear that the Circuit Court in *Odom* made no factual determination of the navigability of the lakes in issue.

(Trustees' brief at 26). Thus, the majority's failure to follow *Odom* is based upon a distinction that has been unanimously repudiated by the parties to this controversy.

The *Odom* record-on-appeal contained the following sworn answer to an interrogatory on the point at issue:

> Angela Lake as designated by the plaintiff, and all other waterbodies within the Butler Chain of Lakes are navigable waters of the State of Florida and held by the Board of Trustees in its sovereign capacity.

(Answer of John W. Dubose). The *Odom* trial court did not reach the issue of navigability *in fact* because it determined, on motion for summary judgment, that the waters were non-navigable *as a matter of law*. In concluding to the contrary, the majority here has disregarded the Court's own record in the *Odom* case.[6]

There is still nother deficiency in the majority's analysis of the *Odom* rationale. After quoting the statement in *Odom* that

> it seems absurd to apply this test [notice of navigability] to small, non-meandered lakes and ponds of

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[6] In addition to Dubose's sworn answer quoted above, which is in the original record now lodged in the trial court, the following matters appear in this Court's file: "[T]he Butler Chain of Lakes is a navigable chain of lakes, the title to which is now vested in the Board of Trustees in its sovereign capacity." Sworn answers of John W. Dubose to interrogatories numbered 25 and 27, pp. 65-66, appendix to brief of appellee The Deltona Corporation. "In adopting the judgment of the lower court, this Court recognized that the question of navigability is a question of fact. . . ." Paragraph 19, Petition for Rehearing of Attorney General. "[N]avigability is still an unresolved factual issue." Paragraph C.1., Trustees' Petition for Rehearing.

> less than 140 acres and, in many cases, less than 50 acres in surface. . .

the majority states that "[t]he ground on which *Odom* rests is *this factual determination* that the small lakes and ponds at issue were non-navigable, non-sovereignty lands" (emphasis added). There are at least three things wrong with that statement. First, the language quoted from *Odom* clearly is not a factual determination; it is a conclusion of law. Second, it just as clearly is not a determination that the waterbodies were "non-navigable, non-sovereignty lands;" rather it is a determination that "notice of navigability" should not be applied to small lakes and ponds. And, finally, even if it were a factual determination, the Florida Supreme Court is hardly the forum for determining facts, particularly on appeal from a summary judgment as in *Odom*.

Because of the majority's misperception of the holding in *Odom*, rehearing is essential in these cases.

II.

Perhaps the strangest aspect of the majority opinion is its failure to advise the district court of appeal, in response to its second certified question, of the basis for rejecting this Court's own precedent upon which the district court understandably relied.

The second certified question involves the doctrine of legal estoppel or estoppel by deed. The district court of appeal gave an affirmative answer to the second certified question, holding:

> [T]he court properly concluded that defendants are estopped from asserting any right or title in derogation of the 1883 deeds conveying swamp and overflowed lands. *Board of Trustees of the Internal Improvement Fund v. Lobean*, 127 So.2d 98 (Fla. 1961). . . .

454 So.2d at 8. In answering the second question, the majority does not even mention *Lobean*, let alone advise the district court or the parties why it is not controlling.

Lobean involved submerged, sovereignty lands in Gasparilla Sound. The lands were mistakenly conveyed to Lobean in a Murphy Act deed.[7] Manifestly, the Trustees could not have intended to convey sovereignty lands by Murphy Act deed, yet this Court held that they were estopped to question Lobean's title or the recitals in their deeds. Applied here, that holding means that the Trustees are likewise estopped to question the recitals in their 1883 deeds that the lands conveyed were swamp and overflowed lands, not sovereignty lands.

Unless the majority intends to overrule *Lobean*, rehearing is required to apply its holding to the facts of these cases. If the majority does intend to overrule *Lobean*, it should clearly articulate the policy reasons for doing so, bearing in mind the peculiar application of stare decisis principles to substantive real property rules. *Askew v. Sonson, supra.* Nor does *Lobean* stand alone as recent (rather than ancient) precedent for application of the doctrine of legal estoppel to the facts of these cases. Six members of the *Odom* court concurred in the application of the doctrine of legal estoppel to preclude the Trustees from asserting sovereignty title to lands which had been deeded by their predecessors as non-sovereignty lands.[8]

The result in *Lobean* is fully compatible with and supported by the doctrine of after-acquired title. A lesser

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[7] Because sovereignty lands are not subject to taxation, title to such lands could never vest in the Trustees under the provisions of the Murphy Act.

[8] The dissenting opinion of Justice Sundberg in *Odom*, concurred in by Justice Overton, expressly adopted the legal estoppel holding as correct. Consequently, two justices who approved the application of legal estoppel in *Odom* have shifted positions in the present case.

property interest than fee simple can constitute property within the rule of estoppel as to after-acquired property. *Spencer v. Wiegert*, 117 So.2d 221, 226 (Fla. 2d DCA 1959), *cert. denied*, 122 So.2d 406 (Fla. 1960). The Trustees acquired statutory authority to *sell or lease* mineral interests in 1923[9] and again in 1929.[10] Consequently, when the Trustees acquired title to or authority over those mineral interests by act of the legislature, their after-acquired authority was sufficient to perfect title to the minerals in the grantees under their 1883 deeds. Thus, Mobil's predecessors had long before acquired title to the minerals involved in this case when the Trustees purported to lease them to Coastal in 1946.[11]

III.

The centerpiece of the majority's answer to the third certified question, dealing with MRTA, is its assessment of legislative history leading to the 1963 Act. This assessment erroneously assumes a predicate that is nonexistent and proceeds to reach a conclusion that is contradicted by historical facts.

In discussing the original enactment of MRTA in 1963, the majority simply stated its crucial premise:

> We see nothing in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets.

That premise is errant for the obvious reason that the parties neither briefed nor argued legislative history

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[9] Ch. 9289, Laws of Florida (1923).

[10] Ch. 13670, Laws of Florida (1929).

[11] Because Coastal did not appeal the final judgment below, it was not a party in the district court of appeal and is not a party here. For that reason, this motion addresses only the Trustees' claim against Mobil, which is the only claim passed upon by the majority opinion.

antecedent to passage of the Act of 1963.[12] The reason they did not is equally obvious; since *Sawyer v. Modrall*, 286 So.2d 610 (Fla. 4th DCA), *cert. denied*, 297 So.2d 562 (1974), the Act has consistently been construed for a dozen years as saying what it plainly means and meaning what it plainly says: that *all* interests, both private and *governmental*, including those of the state and its agencies, are extinguished by operation of the Act. No legislative history is necessary to ascertain the meaning of that unambiguous language.

But the majority's conclusion, quoted above, is flawed for another reason, one that is rooted in the historical facts underlying this dispute. To understand what the legislative intent *might* have been, if the Act were ambiguous in any way, one need only recall the state's policy of managing sovereignty lands at the time the Act was adopted.

For approximately a decade, beginning during the late 1950s and continuing until adoption of the 1968 Constitution, the Trustees regularly held Tuesday auctions at which sovereignty lands were sold to the high bidder. Appended to this motion (App. 5-57) are excerpts from the minutes of Trustee meetings from April 2, 1963, to June 4, 1963—the period during which the 1963 legislature was in session.[13] These public records reveal that

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[12] The only legislative history brought to the Court's attention was that supporting adoption of the 1978 MRTA amendment.

[13] Respondent asks the Court to judicially notice these public records obtained from the Trustees' archives. On past occasions the Court has judicially noticed public documents in connection with a rehearing request when appropriate to correct oversights in the Court's initial opinion. For example, in Hayek v. Lee County, 231 So.2d 214 (Fla. 1970), Case No. 38,949, the Court granted rehearing and reversed its position, based in part upon submissions made by the Attorney General: "[W]e urge now that the Court knows what everybody knows. . . ." Petition for Rehearing filed November 19, 1969, by the Attorney General asking the Court to take judicial notice of certain public records and attaching documentary evidence in support of the petition.

the Trustees sold twenty-three parcels of sovereign lands —the "irreplaceable public assets" described by the majority—while the 1963 session of the legislature was sitting.[14] Against this background of undisputable historical fact, to argue that the legislature could not have intended to permit the disposal of sovereignty lands by operation of law is simply incredible. The 1968 Constitution changed the practices described above. But the dispositive facts now before the Court were all in place long before 1968.

The majority's failure to apply a 1963 perspective to its search for 1963 legislative intent is another error requiring reconsideration of the present opinion.

IV.

In ruling that the legislature of Florida did not intend to divest the state of title to the lands here at issue, the majority either overlooked or failed to consider the effect of nineteenth century legislation directly affecting lands in the Peace River area.[15]

In 1860 the legislature addressed the navigability of "Peas Creek," the name given the upper reaches of the Peace River by the government surveyors. It passed a law authorizing the Trustees to contract "for the cleaning out of the channel of Peas creek, *in order to render said stream navigable* and for the purpose of draining the swamp and overflowed land *thereon*" (emphasis added). When that purpose was not achieved, the legislature passed another act in 1881 reciting that a certain

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[14] The waterbodies beneath which these sovereign lands lay were the following: Biscayne Bay, Florida Straits, Jupiter Sound, Halifax River, Indian River, Sacarma Bay, Banana River and Stranahan River.

[15] Chapter 1199, Laws of Florida (1860); chapter 3322, Laws of Florida (1881). These statutes are appended to this motion (App. 2-4). They were brought to the Court's attention by Notice of Supplemental Authority served prior to oral argument and by counsel's presentation at oral argument.

contractor had failed to deepen the channel of the creek and authorizing the Trustees to sell the lands coursed by the creek. Read together, those two legislative enactments effectively classified Peas Creek as non-navigable in its ordinary state[16] and expressly authorized the Trustees to sell the lands presently owned by Mobil.

The majority deals only with section 197.228(2) (now section 253.141(2)), Florida Statutes, in examining legislative intent to dispose of these lands. Its failure to consider legislative intent as reflected by a statute adopted just two years before the deeds in question were executed is a serious oversight requiring reconsideration on rehearing.

V.

If rehearing is not granted on other grounds, the majority should at a minimum modify its opinion and decision to make them prospective in effect. Such a holding would protect the Trustees' sovereignty claim under the public trust doctrine without penalizing landowners who relied upon the state's classification of the lands as non-sovereignty for more than a century.[17]

Regardless of the majority's present characterization of its *Odom* holding, it is beyond dispute that the decision was universally understood as holding that the Trustees' claims "to beds underlying navigable waters previously conveyed are extinguished by the Act." It was

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[16] Determination of navigability is based upon the waterbody's ordinary and natural condition, Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909), without consideration of artificial improvements making it navigable, Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).

[17] If the decision is applied prospectively, the prospective application could be either from the date the decision becomes final or, alternatively, from the date of any judicial determination that an original conveyance by the Trustees was invalid. The latter disposition is suggested in the motion for rehearing filed by Estech, Inc.

demonstrably so understood by the Trustees themselves,[18] by the federal appellate court having jurisdiction over cases arising in Florida,[19] and by all district courts of appeal confronting the issue between 1977 and 1986.[20] By denying review in *Board of Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Company, Inc.*, 414 So.2d 10 (Fla. 5th DCA 1982), *pet. for rev. denied*, 432 So.2d 37 (Fla. 1983), presenting the precise MRTA issue now on review, the Court did nothing to call that universal interpretation into question.[21]

Prospective application of the Court's holding would comport with the conclusion reached by the Marketable Record Title Act Study Commission created by the 1985 session of the legislature. In its majority report, the Commission concluded as follows:

> It also seems *inequitable*, in light of the confusion that has existed, that the State seek damages, fees, royalties or rent for its proprietary interests to which it might otherwise be entitled for the occupancy, use or *severance of resources* from submerged lands.

(Emphasis added). That inequity, of course, is what the present cases are all about.

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[18] "WHEREAS, certain recent court decisions hold that the Marketable Record Title Act, Chapter 712, Florida Statutes, could operate to extinguish state title to sovereignty lands, contrary to the public trust doctrine by which these lands are held. . . ." Excerpt from Resolution of the Trustees dated June 6, 1978, urging the legislature to exempt sovereignty lands from application of MRTA (Trustees' appendix at 79).

[19] Starnes v. Marcon Investment Group, 571 F.2d 1369, 1371 (5th Cir. 1978) ("the State's claims of sovereignty were extinguished by operation of the Florida Marketable Record Title Act").

[20] See cases cited at p. 26, Answer Brief of Cyanamid-Estech.

[21] Justices Adkins, Boyd, McDonald and Ehrlich voted to deny review in *Paradise Fruit*. Justice Overton dissented, finding conflict with *Odom* and *Martin v. Busch*.

The Court should grant rehearing and modify its opinion and decision to operate prospectively. Such a disposition would in the main accommodate the competing interests of the parties to this litigation.

VI.

The majority opinion construes Florida law in a manner that effectively takes Mobil's property in violation of the Fifth Amendment to the United States Constitution, as made applicable to the State of Florida by the Fourteenth Amendment. The majority decision allows the executive branch to reclassify lands a century after their conveyance into private ownership. It further constitutes judicial construction of a legislative act in derogation of its plain meaning so as to divest rights granted by the legislature.

As to the first point, the state classified the lands at issue as swamp and overflowed lands under legislatively directed procedures during the 1850s. Subsequently, the predecessor Trustees deeded the lands to Mobil's predecessors as swamp and overflowed lands, confirming the earlier classification. For more than 100 years after the initial classification of these lands as swamp and overflowed, the Trustees maintained that classification as official state policy.[22] To permit reclassification by al-

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[22] In a *1965* brief filed on behalf of the Trustees to oppose Coastal's claim that its lease encompassed the headwaters of the Peace River, the Attorney General argued "that the Peace River was not meandered north of a line more than seventy (70) miles south of Lake Hancock," and therefore "the state did not own any of the Peace River bottom at that point." The First District Court of Appeal agreed with the Trustees' position and said in its decision: "Peace River north of Township 38/39 is not meandered and does not belong to the State. That is, Peace River for a distance of 40 miles south of Lake Hancock is in private ownership." Burns v. Coastal Petroleum Co., 194 So.2d 71, 74 (Fla. 1st DCA 1966), *cert. denied,* 201 So.2d 549 (Fla. 1967), *cert. denied,* 389 U.S. 913 (1967). *All of the lands at issue here are within that upper portion*

legations asserted in the present litigation a century after the conveyance into private ownership is a clear taking of private property by the state without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[23]

The majority's construction of MRTA also constitutes a taking of vested property rights. As discussed above, point III, *supra*, the appellate courts of Florida, including this Court, consistently construed MRTA, for twelve years, as meaning what it obviously says: that governmental as well as private claims are extinguished by the provisions of the Act. The legislature could not constitutionally change that meaning by a retroactive amendment to the Act. It is equally repugnant to constitutional principles for this Court to achieve the same result by judicial interpretation.

For all of the reasons asserted in this motion, the Court should rehear and reconsider its decision filed May 15.

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May 30, 1986

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of the Peace River which the state acknowledged and the court declared to be privately owned.

Other dates pertinent to a showing that the lands were considered and classified as nonsovereignty lands are shown on the chart displayed to the Court by counsel during oral argument (App. 1).

[23] See cases cited at page 22 of Mobil's Answer Brief. See also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *pet. for cert. filed* (Sept. 1985).